Supreme Court, U.S.
FILED
AUG 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

90-304

In The

# Supreme Court of the United States

October Term, 1990

CENTENNIAL SCHOOL DISTRICT and RONALD Y. WHITE, in his official capacity as Supervisor of Secondary Education for the Centennial School District,

*Petitioners,*

*vs.*

HARRY GREGOIRE; DAVID URBANY; SCOTT IRWIN; HERMAN DIETSCH; RICH MILLER; and CAMPUS CRUSADE FOR CHRIST, INC.,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED

1. Whether under the First Amendment a public school system that permits access to its facilities for community youth groups, adult education classes, athletic programs, and community civic, cultural, and service organizations is an open public forum, required to permit access to all classes of speech, or a nonpublic forum, permitted to limit access on a reasonable basis to uses compatible with the mission and function of the school system in the community.

2. Whether the principle of *Widmar v. Vincent*, 454 U.S. 263 (1981), requiring equal access for student religious groups to the facilities of a state university that operated as an open public forum, should be applied to public elementary and secondary schools, or whether such schools have an interest in neutrality, distinct from university campuses, that permits them to allow access to noncontroversial community civic, cultural, and service groups, but exclude access to nonstudent religious groups seeking to use school facilities to worship or proselytize.

3. Whether a school district's compliance with its obligations under the Equal Access Act, 20 U.S.C. §§ 4071-4074, permitting student religious groups to meet during the limited open forum defined in the Act for meetings of student clubs and organizations, may be used as evidence against the school district to demonstrate that, contrary to its officially stated policy, it generally maintains an open public forum at its school facilities.

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No.

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CENTENNIAL SCHOOL DISTRICT and RONALD Y. WHITE, in his official capacity as Supervisor of Secondary Education for the Centennial School District,

*Petitioners,*

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HARRY GREGOIRE; DAVID URBANY; SCOTT IRWIN HERMAN DIETSCH; RICH MILLER; and CAMPUS CRUSADE FOR CHRIST, INC.,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners Centennial School District and Ronald Y. White, in his official capacity as Supervisor of Secondary Education for the Centennial School District, respectfully pray that a writ of certiorari issue to review the judgment and opinion

below of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on June 22, 1990.

## OPINIONS BELOW

The United States District Court for the Eastern District of Pennsylvania granted respondents preliminary injunctive relief on October 28, 1987. *Gregoire v. Centennial School District*, 674 F. Supp. 172 (E.D. Pa. 1987). That decision was affirmed without opinion by the United States Court of Appeals for the Third Circuit. *Appeal of Centennial School District*, 853 F.2d 917, 918 (3d Cir. 1988). On November 30, 1988, the District Court granted respondents permanent injunctive relief. *Gregoire v. Centennial School District*, 701 F. Supp. 103 (E.D. Pa. 1988). On June 22, 1990, the Third Circuit affirmed the grant of permanent injunctive relief, by a 2-1 vote. *Gregoire v. Centennial School District*, ____ F.2d ____ (3d Cir. 1990) (Slip op., attached as Appendix A). Circuit Judge Mansmann wrote the majority opinion, joined by District Judge Kosik, sitting by designation. Circuit Judge Stapleton dissented.

## JURISDICTION

The petition for certiorari is filed within 90 days of the judgment and opinion of the Third Circuit, dated June 22, 1990, and prior to August 18, 1990, the date on which the Third Circuit's stay of mandate expires. This Court's jurisdiction is invoked under 28 U.S.C.A. Section 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free

> exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## STATEMENT OF THE CASE

This dispute began when the petitioner, Centennial School District ("Centennial"), refused to lease its auditorium at William Tennent High School to respondent, Campus Crusade for Christ, Inc. ("Campus Crusade"), on the grounds that Campus Crusade intended to use the facility for religious activity.[1]

Campus Crusade, and its subsidiary, Student Venture, are evangelical Christian organizations. Student Venture applied to rent the auditorium of William Tennent High School for Saturday, October 31, 1987, for the purposes of staging a Halloween performance by Andre Kole, a Christian evangelical magician and illusionist. Kole often appears as a special traveling representative for Campus Crusade and Student Venture. He regularly performs his magic show, takes a brief intermission so that persons who desire to leave may do so, and then delivers his proselytizing evangelical message. By respondents' own admission, the purpose of Campus Crusade, Student Venture, and Kole is to convert others to their Christian evangelical religion.[2]

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1. Harry Gregoire and all other respondents in this litigation are related to Campus Crusade, or its subsidiary Student Venture.

2. In their Amended Complaint, Respondents candidly stated:

> Plaintiffs all have evangelical Christian beliefs, including a sincere religious belief about evangelizing people in order to convert them to believe in Jesus Christ as Lord and Savior.

(Cont'd)

Respondents filed suit in the Eastern District of Pennsylvania, claiming that the denial of the auditorium facility violated their First Amendment freedoms of speech and assembly, the Fourteenth Amendment's Equal Protection Clause, and both the Free Exercise and Establishment Clauses of the First Amendment. On October 28, 1987, the District Court entered a Preliminary Injunction Order enjoining Centennial from refusing to rent public school facilities to groups or individuals solely because of the religious content of their speech. The Court further enjoined Centennial from preventing Campus Crusade and Student Venture from renting the auditorium on October 31 for the Andre Kole performance. *Gregoire v. Centennial School Dist.*, 674 F. Supp. 172 (E.D. Pa. 1987) *aff'd without opinion, Appeal of Centennial School Dist.*, 853 F.2d 917, 918 (3d Cir. 1988).

The basis of the District Court's preliminary injunction was that Centennial had created an "open forum" for free speech and assembly at its school facilities by renting them to a wide assortment of groups in the community. *Gregoire, supra*, 674 F.

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(Cont'd)

> The Andre Kole performance contains both a magic/illusion show and a Christian evangelism message. The program is intended to both entertain people in the audience, and present them with the Christian gospel message.

Similarly, the promotional literature for Mr. Kole contained in the record below further describes the nature of his performance:

> As part of his elaborate stage production, Andre exposes some of the fraudulent and deceitful hoaxes that he has investigated, and reveals the truth behind transcendental levitation, dematerialization, the Bermuda Triangle mystery, the occult and communication with the dead. Then he shares his findings as he investigated the miracles of Christ and how his discovery that Jesus Christ was who He claimed to be, the Son of God, the Savior of mankind, changed the entire course of his life.

Supp. at 177. Having created an open public forum, the Court reasoned, Centennial could not refuse to rent its facilities to a group solely because of the religious content of the group's message. The District Court relied primarily upon this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), which held that the University of Missouri at Kansas City had created an open public forum for student groups, and thus could not deny use of its facilities to an evangelical Christian student organization.

Pursuant to the District Court's preliminary injunction, the Kole performance took place on October 31, 1987.

On March 8, 1988, Centennial modified its facilities use policy to make it clear that it did not intend for its facilities to be open public forums. The new policy set forth the types of groups that could use school district facilities, and the conditions placed on that usage. The constitutionality of that policy is now the issue in this litigation.

The new policy permits the following groups, among others, to use its facilities:

> Centennial resident civic, cultural and service organizations having a majority of Centennial resident membership and/or an on-going connection with the Centennial community.
>
> a. Civic: Centennial neighborhood associations organized for the purpose of discussion of neighborhood affairs.
>
> b. Cultural: Centennial resident music, artistic, player associations organized for the purpose of rehearsal, performance of music compositions, plays or art displays.

> c. Centennial Resident Service Organizations: Rotary, Kiwanis, Lions, Jr. Chamber of Commerce and like non-sectarian organizations.

The policy also permits school facilities to be used by "community based employee associations and labor unions (limited to members only) for meetings only," and "commercial profit making ventures which charge admission or sell tickets for the staging of plays and/or musical performances suitable for general audiences." Adult education and college classes are also conducted at Centennial facilities. The new use policy excludes religious services and the distribution of religious literature, stating:

> c. In any event, religious services (defined to include the invocation of, worship to, prayer to, or adoration of a deity) is prohibited.
>
> d. The sale or distribution of Bibles, testaments, scriptures or religious literature is prohibited.

In compliance with its obligations under the Equal Access Act, 20 U.S.C. §§ 4071-4074, Centennial also maintains the statutorily-defined "limited open student forum" for student-initiated meetings during the activity periods for student groups and clubs.[3] As required by the Act, student religious groups are

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3. This Court interpreted and upheld the Equal Access Act in its recent decision in *Board of Education of the Westside Community Schools v. Mergens*, 110 S. Ct. 2356 (1990). This litigation does not implicate Centennial's statutory obligations under the Equal Access Act, but rather its constitutional obligations with regard to the use of its facilities in contexts not within the coverage of the Act. As discussed more fully in the section below, this case presents the constitutional law sequel to the statutory issues decided in *Mergens*.

permitted to use Centennial facilities within the "limited student open forum."[4]

Pursuant to its revised policy, Centennial continued to assert that it had not created an open public forum, and that it was entitled to exclude access to groups seeking to use its facilities for religious purposes. Alleging that they may wish to use Centennial facilities again for religious purposes, respondents returned to the District Court and sought to have the new Centennial policy struck down, requesting a permanent injunction prohibiting Centennial from preventing them access to school facilities because of the religious content of their message. The District Court granted the permanent injunctive relief sought by the plaintiffs on November 30, 1988. *Gregoire v. Centennial School District*, 701 F. Supp. 103 (E.D. Pa. 1988). From that final injunctive order Petitioners appealed to the Third Circuit. Respondents filed a cross-appeal, seeking to have the District Court's injunction enlarged so as to specifically embrace religious worship, and to enjoin Centennial's prohibition on the sale or distribution of religious literature.[5]

The forum at issue in this litigation is not limited to the high school auditorium. As the parties and courts below have framed the controversy, the forum encompasses all of the School District's facilities used by outsiders, including gymnasiums, athletic fields, swimming pools, classrooms, auditoriums, cafeterias, and other

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4. The ban on religious services and literature applicable to outside nonstudent groups does not apply to student groups exercising their Equal Access Act rights.

5. The District Court had not ruled on Centennial's ban on the sale or distribution of religious literature, and denied a "Motion for Clarification" filed by the Respondents after the entry of its Permanent Injunction Order, in which Respondents sought to have the scope of the injunction enlarged.

general-purpose rooms spread across one high school, two junior high schools, and eight elementary schools. Throughout this litigation Centennial has conceded that it permits extensive use of its facilities for adult education classes, youth groups such as Boy Scouts, Girl Scouts, Brownies, Cub Scouts, Indian Princesses, and Indian Guides, athletic leagues, cheerleading groups, civic groups such as the Rotary Club, Kiwanis, Lions, and Jaycees, and miscellaneous other community organizations. Centennial argued that all of these uses are fully compatible with its stated facilities use policy, and that neither the stated policy nor Centennial's consistent practice under that policy create an open public forum.

In a 2-1 decision on June 22, 1990, the Third Circuit affirmed the granting of permanent injunctive relief. *Gregoire v. Centennial School District*, ____ F.2d ____ (3d Cir. 1990) (Slip op., attached as Appendix A). The majority opinion, written by Circuit Judge Mansmann and joined by District Judge Kosik (sitting by designation), held that Centennial had created an open forum, and thus, under the doctrine of *Widmar v. Vincent, supra*, could not exclude religious speech. Centennial, the Court observed, in complying with its obligations under the Equal Access Act, permits religious speech by student groups during its "limited open student forum" period. Slip op. at 14. Religious topics, the Court further noted, may also be freely discussed during adult education classes. Slip op. at 18. The Court emphasized that Centennial regularly permits various community groups to use its facilities, including meetings by "politically active groups, such as neighborhood associations, labor unions and civic organizations." Slip op. at 18. In addition to upholding the permanent injunctive relief granted by the District Court, the Court of Appeals also granted respondents relief on their cross-appeal, remanding to the District Court with instructions to enlarge the scope of the permanent injunction to encompass religious worship and to prohibit

Centennial from enforcing its ban on the distribution of religious literature. Slip op. at 36-39.

Judge Stapleton filed a lengthy dissent, observing that "nothing in the record suggests that Centennial has not followed its new written policy consistently and in good faith." Slip op. at 41 (Stapleton J., dissenting). The critical issue in the litigation, therefore, was whether Centennial through its regulations had created an open public forum or a nonpublic forum. Centennial's policy, Judge Stapleton reasoned, was deliberately crafted not to create an open forum. The majority opinion, Judge Stapleton argued, was "based on the assumption that when a public entity permits an increasing number of different groups to use its facilities there comes a point at which it has created a public forum by dedication and can no longer exclude anyone absent a compelling interest." Slip op. at 46 . That assumption, Judge Stapleton maintained, is erroneous: "a public entity is entitled to define the limits of any forum it creates so long as there is a basis for excluding the excluded speakers that is reasonable in light of the purpose of the forum and so long as it does not engage in viewpoint discrimination." Slip op. at 46.

## REASONS FOR GRANTING THE WRIT

### I.

**SCHOOL DISTRICTS THROUGHOUT THE NATION THAT PERMIT NONPARTISAN COMMUNITY AND CIVIC GROUPS TO USE THEIR FACILITIES NEED GUIDANCE CONCERNING THEIR FIRST AMENDMENT OBLIGATIONS TO PERMIT ACCESS TO PARTISAN POLITICAL AND RELIGIOUS ORGANIZATIONS. THIS GUIDANCE IS PARTICULARLY URGENT IN LIGHT OF THE CONSTITUTIONAL QUESTIONS LEFT UNANSWERED BY THIS COURT'S DECISION IN *BOARD OF EDUCATION V. MERGENS.***

This case presents a constitutional question of enormous practical moment to school districts around the nation. The uses of the various auditoriums, classrooms, cafeterias, and other facilities within the Centennial public schools are typical fare for school facilities throughout the country: community youth groups, adult education classes, athletic programs, and civic organizations. If the Third Circuit's analysis is correct, then these usages have converted most American public school facilities into open public forums, to which even the most fractious religious and political speakers must be routinely allowed access. School districts should not be forced by the First Amendment to the draconian choice of closing their doors to the likes of the Girl Scouts, adult education classes, and local Rotary Clubs if they are to avoid becoming a soapbox for every form of divisive proselytizing speech.

The need for this Court's guidance is particularly pressing in the aftermath of the decision last term in *Board of Education of the Westside Community Schools v. Mergens, supra*, 110 S. Ct. 2356 (1990), sustaining the Equal Access Act, 20 U.S.C.A. §§ 4071-4074.

In *Mergens* this Court held that the "limited open forum" created by Congress in the Equal Access Act should not be equated with the terms of art that have been adopted in First Amendment jurisprudence. "Indeed, Congress' deliberate choice to use a different term — and to define that term — can only mean that it intended to establish a standard different from the one established by our free speech cases." *Mergens, supra*, 110 S. Ct. at 2367-68. This Court thus stated that "[b]ecause we rest our conclusion on statutory grounds, we need not decide — and therefore express no opinion on — whether the First Amendment requires the same result." *Id.* at 2370. This litigation takes up the question specifically left open in *Mergens*.

*Mergens* was an Establishment Clause case; this is a public forum law case. *Mergens* merely holds that the Establishment Clause was not violated when Congress, exercising the fulcrum created by federal aid to education, made the policy decision to encourage schools to allow student-initiated religious groups access to school facilities on the same terms as other student-initiated clubs. But *Mergens* explicitly did not hold that such a policy choice was constitutionally *compelled* by the Free Speech Clause, and the Act did not guarantee access to nonstudent-initiated speech of outsiders. The opinion of the Third Circuit, however, accomplishes precisely that. It turns the First Amendment into a sweeping equal access act, putting school districts to an "all or nothing" choice regarding access to nonstudent-initiated groups.

There is, indeed, an inexorable rachet effect to the Third Circuit's use of the Equal Access Act. The Court pointed to the fact that Centennial permits student-initiated religious groups to use its facilities during the limited open forum activity period covered by the Act to support its conclusion that Centennial had created an open forum by granting indiscriminate use of its facilities. Slip op. at 14-17. But Centennial was *required* by the federal statute to permit access to student religious groups during that period. The Court used Centennial's compliance with federal law as evidence against the District concerning its general facilities use policy. Under this logic, a school district that chooses not to forfeit federal educational assistance (a practical necessity for many districts) may find that opening its facilities up for use by student religious groups within the limited parameters of the Act will be utilized as a factor against the school's effort to circumscribe the use of its facilities in other contexts.

This Court certainly did not intend for its narrowly drawn opinion in *Mergens* to be used to dramatically enlarge the First Amendment obligations of school districts in contexts not encompassed by the Equal Access Act. As this Court emphasized

in *Mergens*, in seeking to prevent discrimination against religious groups, Congress emphasized that its "limited open forum" would be triggered only by meetings that are "student-initiated" and that "are not directed, controlled, conducted, or regularly attended by 'nonschool persons.' " 110 S.Ct. at 2364. The Third Circuit's expansive interpretation of First Amendment public forum law, by contrast, triggers obligations toward partisan groups that are not student-initiated and controlled by nonschool personnel. And these obligations come not because the policies or practices of Centennial are unusually permissive. Centennial's facilities have been used for exactly what American high school and elementary schools have "time out of mind" been used for: sports, meetings of student groups and clubs, adult education classes, and activities of community youth, civic, and cultural organizations.

This Court should therefore grant this petition not merely because the Third Circuit has erred in its application of public forum law, but because it has erred in a manner that unfairly exploits the Equal Access Act and *Mergens*—thereby putting school districts around the country under enormous pressures in determining their facilities use policies. As Judge Stapleton succinctly put it:

> The result reached by the court today is extremely unfortunate. School facilities are community assets; their utility should be maximized. Liberal facility use policies like that of this school district should, therefore, be encouraged. At the same time, we must be realistic enough to acknowledge that proselytizing a general audience from the school community including parents and young children can have a disruptive effect on the school community and can convey to some an unintended message of partiality on the part of the school district. School board

> members who have legitimate concerns about such matters should not have to choose between admitting Student Venture to the auditorium and either cutting back dramatically on the number of groups granted access or prohibiting religious discussions among students in the afternoon open forum or among adults in the evening program. Either course would exact a high and, in my view, unnecessary price.

Slip op. at 64-65 (Stapleton, J., dissenting).

## II.

## THE DECISION BELOW DISTORTS PUBLIC FORUM LAW AND CONFLICTS WITH THE HOLDINGS OF THIS COURT AND OTHER LOWER FEDERAL COURTS, BY EQUATING FOR CONSTITUTIONAL PURPOSES THE OPEN PUBLIC FORUM RECOGNIZED AT THE UNIVERSITY LEVEL IN *WIDMAR V. VINCENT* WITH THE FORUMS CREATED AT PUBLIC SECONDARY AND ELEMENTARY SCHOOLS.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court dealt with the access policies of the University of Missouri at Kansas City. *Widmar* involved a registered campus organization of evangelical Christian students from various denominational backgrounds, that had regularly sought and received permission to conduct its meetings in university facilities. In 1977, however, the university informed the group that it could no longer meet in the university buildings, claiming that such a use would violate the Establishment Clause. This Court held that because the university's campus was an open public forum, it could not exclude speech on the basis of content absent compelling state interests.

It is critical to keep in mind that there was *no contest* in *Widmar* over the open public forum status of the university campus. The university did not defend on the basis that it had not created a public forum, nor did it attempt to avoid application of the strict scrutiny test. Rather, the university argued that its interest in avoiding a violation of the Establishment Clause created a compelling state interest sufficient to satisfy strict scrutiny review. This Court in *Widmar* therefore accepted as a given that the Missouri campus was an open public forum, and it constantly emphasized the breadth of that forum. The Court repeatedly referred to the Missouri campus as "a forum generally open to the public," *Widmar, supra,* at 268, "a public forum," *id.* at 270, a "public forum, open to all forms of discourse," *id.* at 273, an "open forum," *id.* at 274, and "a forum generally open to student groups." *Id.* at 477. Applying the test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the Court held that permitting access to a student religious group in an open public forum would not violate the Establishment Clause, and that the university thus could not deny access to its otherwise open forum. In a nutshell, this litigation presents the question: "When does the First Amendment impose the public forum requirements of *Widmar* upon secondary and elementary schools?"[6]

While Justice O'Connor's opinion for the Court in *Board of Education v. Mergens, supra,* expressly avoided resolution of this First Amendment issue, five members of this Court in *Mergens* strongly intimated that the First Amendment public forum rules of *Widmar* do not necessarily apply to the lower grades. Justice Kennedy's concurring opinion (joined by Justice Scalia), for

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6. It should be emphasized that Centennial's position in this litigation does *not* turn on whether its policy is mandated by the Establishment Clause, but rather on the preliminary threshold question of whether it has created an open public forum at all.

example, pointed out that "[t]he student clubs recognized by Westside school officials are a *far cry* from the groups given recognition by university officials in *Widmar v. Vincent*," and that the consequence of the Equal Access Act is "that clubs of a most controversial character might have access to the student life of high schools that in the past have given official recognition only to clubs of a more conventional kind." 110 S.Ct. at 2376 (Kennedy, J, concurring) (emphasis added). While Congress has the constitutional power to wrest this policy choice from the traditional discretion of local school officials, it does not follow that the policy choice made by Congress was constitutionally compelled. Indeed, Justice Stevens — who actually reached the constitutional free speech question in *Mergens* — explicitly rejected the application of *Widmar* to public schools:

> To extend *Widmar* to high schools, then, would require us to pose two questions. We would first ask whether a high school had established a forum comparable under our Free Speech Clause jurisprudence to that which existed in *Widmar*. Only if this question were answered affirmatively would we then need to test the constitutionality of the Act by asking whether the Establishment Clause has different consequences when applied to a high school's open forum than when applied to a college's. I believe that in this case the first question must instead be answered in the negative, and that this answer ultimately proves dispositive . . . .
>
> The forum at Westside is considerably different from that which existed at the University of Missouri . . . .

> . . . . What the Court of Appeals failed to recognize, however, is the critical difference between the university forum in *Widmar* and the high school forum involved in this case. None of the clubs at the high school is even arguably controversial or partisan.

*Id.* at 2384, 2385 (Stevens, J., dissenting). And Justice Marshall (in an opinion joined by Justice Brennan) observed that "the underlying difference between this case and *Widmar* is not that college and high school students have varying capacities to perceive the subtle differences between toleration and endorsement, but rather that the University of Missouri and Westside *actually choose to define their respective missions in different ways.*" *Id.* at 2381 (Marshall, J., concurring) (emphasis added).

The local public school is not the giant state university. The relation of the school building to the surrounding community is different in kind from the relation of the university campus to the citizens of the state. In a demographically diverse school district scores of different denominations may span a rich spectrum of Jewish, Christian, Moslem or Eastern religious traditions. None of them want the local school facilities co-opted by others, none of them want their children to receive any messages, overt or implicit, that the school is "not for them." For all of them, the school holds itself out as an island of pluralistic tolerance and neutrality. The school is a place where persons of all faiths or no faith may send their children, secure that in substance and symbol, the school will undertake its educational mission without religious preference.

Although First Amendment rights are not shed "at the schoolhouse gate," *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969), schools have an interest in fastidious neutrality far more intense than most other

governmental enterprises. As this Court has explained, "[i]n no activity of the State is it more vital to keep out divisive forces than in its schools." *Edwards v. Aguillard,* 482 U.S. 578, 584 (1987) *quoting McCollum v. Board of Educ.*, 333 U.S. 203, 231 (1948) (Opinion of Frankfurter, J.). Schools have a powerful interest in rising above religious and political contests, an interest borne of the tension that exists between the pluralism of the student population and the inculcation inherent in the school's educational mission. Precisely because public schools warmly embrace all American children, without regard to religion, race, ethnicity, or politics, and then transmit knowledge, skills, and civic values to that diverse group, schools must jealously guard against both the practice and appearance of religious, racial, or political partisanship. *See, e.g., Edwards v. Aguillard, supra,* 482 U.S. at 584.

The Centennial School District must have the right to define its facilities use policy in a manner that avoids the risk of creating "a crucial symbolic link between government and religion, thereby enlisting — at least in the eyes of impressionable youngsters — the powers of government to the support of the religious denomination . . .". *Grand Rapids School Dist. v. Ball,* 473 U.S. 373, 385 (1985). As Justice Marshall recently observed, "Neutrality toward religion, as required by the Constitution, is not advanced by requiring a school that endorses the goals of some noncontroversial secular organizations to endorse the goals of religious organizations as well." *Board of Education v. Mergens, supra,* 110 S.Ct. at 2380 (Marshall, J., concurring).

There is nothing invidious in Centennial's desire to disassociate school facilities from divisive speech. Indeed, there are forceful public policy rationales for *encouraging* strong ties between a school district and nonpartisan community youth, civic, and cultural groups. Schools can be a positive social force in promoting a sense of community, and building respect for values

of tolerance and equality. Schools should be encouraged to reach out and create lines of communication with community groups; it is not only economical but healthy for groups like the Cub Scouts or Rotary Club to have links with neighborhood schools. In promoting community, stability, and tolerance, a school district should be entitled to resist becoming an open forum for all genres of divisive speech.[7]

This Court's First Amendment jurisprudence clearly permits Centennial to make this choice. In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), this Court faced a content-based restriction that involved political speech at the core of the First Amendment. The city-operated public transit system sold commercial and public service advertising space for car cards on its vehicles. Political or public issue messages, however, were prohibited. This Court upheld the restriction, resting its decision on the city's interest in the preservation of neutrality. "Although American constitutional jurisprudence, in light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech," the Court held, "the nature of the forum and the conflicting interests involved have remained

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7. This Court has "nowhere suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes." *Grayned v. City of Rockford*, 408 U.S. 104, 117-118 (1972). Public schools are vitally important "in the preparation of individuals for participation as citizens." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). They serve as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system" *Id.* at 77. "[L]ocal school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values.' " *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982). The Centennial School District has "a legitimate and substantial . . . interest in promoting respect for authority and traditional values be they social, moral, or political." *Id.* That mission is advanced by setting itself apart as a safe haven from divisive speech.

important in determining the degree of protection afforded by the Amendment to the speech in question." *Id.* at 302-03. "There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians." *Id.* at 304. In these circumstances, the Court held, "the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation." *Id.* Precisely the same concerns weigh heavily on school boards charged with the evenhanded and neutral administration of high school and elementary school facilities.

The decision below conflicts with rulings by other federal circuit courts, which have resisted application of the *Widmar* doctrine to elementary and high schools. Indeed, as another panel of the Third Circuit stated in *Bender v. Williamsport Area School Dist.*, 741 F.2d 538, 548 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986): "Since elementary and secondary schools, unlike universities, are not the academic battleground for clashes among contending lines of thought, particularly since the level of student maturity rarely reaches the more advanced level of those attending college, it is unlikely that school authorities would seek to create a truly open forum in a high school environment for unregulated dialogue and inquiry."[8]

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8. *See also, Student Coalition for Peace v. Lower Merion School Dist.*, 776 F.2d 431, 433-36 (3d Cir. 1985) (finding that no open public forum was created at high school when board of education permitted facilities to be used by nonstudent groups, emphasizing that board's desire to avoid appearance of favoritism was a valid justification for classifying its facilities nonpublic forums); *Garnett v. Renton School Dist. No. 403*, 874 F.2d 608 (9th Cir. 1989) (high school not an open public forum, because permitting groups to use school facilities only according to the school district's guidelines did not constitute opening up its facilities for "indiscriminate use."); *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676 (2d Cir. 1988) (*Widmar* does

(Cont'd)

## III.

## THIS COURT SHOULD CLARIFY PUBLIC FORUM LAW AS IT APPLIES TO SECONDARY AND ELEMENTARY SCHOOLS SO THAT COURTS DO NOT IMPOSE OPEN PUBLIC FORUM STATUS ON SCHOOL DISTRICTS CONTRARY TO A DISTRICT'S STATED POLICY AND CONSISTENT PRACTICE.

This Court has recognized three distinct categories of public forum. The "traditional" public forum consists of places such as streets or parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). The second category is the "designated" open public forum. This category consists of public property operated by the state for indiscriminate use as a place for expressive activity. If the government treats a piece of public property as if it were a traditional public forum, intentionally opening it up to the public at large for assembly and speech, then it will be bound by the same standards applicable to a traditional public forum. The "strict scrutiny" test governs content-based regulation of speech in both of these categories of open public forums; the regulation must be necessary to serve a compelling state interest, and be narrowly drawn to achieve that end. *See, e.g., Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802-03 (1985); *Perry Education Assn. v. Perry Local Educators' Assn.*,

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(Cont'd)
not control in secondary and elementary school setting); *Brandon v. Board of Educ.*, 635 F.2d 971, 980 (2d Cir. 1980) (high school classroom different from the forum in *Widmar*); *Nicholson v. Board of Educ.*, 682 F.2d 858, 863 n. 4 (9th Cir. 1982) (Different considerations govern application of the First Amendment on college campus than at lower level educational institutions).

460 U.S. 37, 46-47 (1983); *United States Postal Serv. v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 132 (1981); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535-36 (1980).

The third category is the "nonpublic" forum. Nonpublic forums consist of publicly owned facilities that have been dedicated to use for either non-communicative *or* communicative purposes, but that have never been designated for indiscriminate expressive activity by the general public. The "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service, supra*, 453 U.S. at 129.

Governmental entities *are permitted* to use the content of speech and the identity of speakers in defining the contours of a nonpublic forum. Such use of content and identity is not governed by the strict scrutiny test, but by a "reasonable nexus" standard. The government "may reserve the forum for its intended purposes, *communicative or otherwise*, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry, supra*, at 46 (emphasis added). Entire *classes* of speech thus may be excluded from a nonpublic forum. Those classes may be identified by content, as long as the exclusion is reasonable in light of the purpose of the forum, and there is no discrimination among viewpoints *within* a class. "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." *Id.* at 49.[9]

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9. *See also Cornelius, supra*, at 806. ("Control over access to a nonpublic forum can be based on *subject matter* and speaker *identity* so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." (emphasis added).

This Court has previously identified a number of specific factors that are relevant to determining if a forum is "designated open" or "nonpublic."

1. *Intent.* This Court has admonished that "[w]e will not find that a public forum has been created in the face of clear evidence of a contrary intent." *Cornelius, supra*, at 803. The Court should look "to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Id.* at 802. *See also, Perry, supra*, 460 U.S. at 47. An open public forum is not created by mere accident or inadvertence. Through either an explicit policy, or unambiguous practice, there must be an actual intent by government to designate the property as a public forum. There is no public forum by prescriptive easement. Similarly, it is improper to infer that the government has created a public forum when the nature of the property is inconsistent with that implication. *Id.*; *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977).

The Centennial School District clearly seeks to avoid turning its elementary and high school facilities into an open forum. If that were not the case, this litigation would not exist. Perhaps the District Court or the Court of Appeals would have reached a different judgment concerning the management of Centennial's property than the School Board. But it is not for courts to make policy on the appropriate scope of usage for public school facilities. "By and large, public education in our Nation is committed to the control of state and local authorities." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).[10] Nor is it for courts to infer intent that

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10. *See also Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) ("The determination of what manner of speech in the classroom or in the school assembly is inappropriate properly rests with the school board,' rather than with the federal courts.")

does not exist. "The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius, supra*, 473 U.S. at 808 (emphasis in original). Centennial is not, of course, free to discriminate on the basis of *viewpoint* in defining its forum. But as long as it chooses a method of limitation that is reasonably related to its mission and viewpoint-neutral, it is for the School Board, and not the District Court or Court of Appeals, to decide whether there shall be any limitation at all.[11]

2. *Whether Use is Indiscriminate, and Open to the General Public.* The government's intent may of course be illuminated by practice, and this Court has looked to whether a facility is open, in policy and practice, to "all comers," or is in design and implementation limited to specific classes of speech. Among the important considerations are the procedures by which parties seeking use of the facility must obtain permission, *see Cornelius, supra*, at 805; *Perry, supra*, at 48; *Greer v. Spock*, 424 U.S. 828, 833 (1976). When permission is selective and not granted "as a matter of course," the forum should not be classified as open. *See Perry, supra*, at 48. In this case, all groups seeking to use school facilities must make a written application. All applications are then subject to approval by the school administration according to Centennial School Board policy. Applications violating the

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11. The Court of Appeals' decision also declared that Centennial's facilities were open forums for the distribution of literature. Slip op. at 38. Centennial's facilities have thus been equated with large urban airports, which are open forums for all brands of divisive and proselytizing speech. *See Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987). Centennial's position is that the Third Circuit's ruling on the literature distribution issue is erroneous. Because that ruling was directly linked to the Court's holding that Centennial had created an open forum, *a fortiori* the Court's ruling on literature distribution would fall if the Court's open forum ruling falls. For that reason, while Centennial preserves the literature distribution issue, it is not singled out for special discussion in this petition for certiorari.

School Board policy, including the prohibition of religious services or activities, are rejected.

3. *Consistency of Past Practices.* Consistency is naturally an important criterion. A school district is not free to say one thing and do another. The essence of the nonpublic forum is discrimination only *among* classes of speech, never *within* classes. As the Third Circuit explained in *Bender, supra*, 741 F. 2d 538, 546 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986), the state "may not exclude expression that falls within whatever objective parameters it has set." Consistent application of the permission procedure, and the lack of any prior grant of access to the forum to a group similar to the rejected applicant are key touchstones. *See, Cornelius, supra*, at 804-05. "When speakers and subjects are similarly situated, the State may not pick and choose. Conversely on government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used." *Perry, supra*, at 55.

Within the parameters it has set, Centennial has been fully consistent. Judge Stapleton, in his dissenting opinion below, engaged in a close analysis of the other users of Centennial's facilities. As Judge Stapleton demonstrated, Centennial has drawn a reasonable line between the speech it includes and the speech it excludes, a line that faithfully vindicates Centennial's interest in preserving neutrality in the eyes of the community. The expressive activity that takes place within adult education classes, or that occurs when groups such as labor unions rent space to conduct meetings among their members *for their own purposes* do not compromise that neutrality. Slip op. at 44 (Stapleton, J., dissenting). These groups do not seek to capitalize on a symbolic connection to the school nor use the school as a base for converting students to their causes. They involve adults talking to adults.

Similarly, when Centennial does open its doors to outside groups for activities to which children or the general public are invited, it is careful to limit that access to nonpartisan civic organizations that do not undercut the district's status as a safe haven of neutrality. No one fears the Girl Scouts, Boy Scouts, or Kiwanis co-opting the school to proselytize for converts, or attempting to dominate the community's political agenda. No eyebrows are raised by a Rotary Club meeting in a school classroom, or a Lions Club pancake breakfast in a school cafeteria, because such organizations occupy positions in the community that are regarded as purely "civic," "public service," and "nonpartisan." This Court has so characterized such groups. *See Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 548-49 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 621-28 (1984).

One of the principle flaws in the Third Circuit's ruling is that it enforces a permanent injunction that requires Centennial to perpetually maintain its facilities as an open public forum. Even assuming, arguendo, that the School District had once unwittingly created a public forum — through inadvertence, inartful drafting, or ignorance of the complexities of public forum jurisprudence — the School District should not have been forced by the District Court and the Court of Appeals to maintain that status indefinitely. Having once admitted respondents, following the directive of the District Court's original preliminary injunction order, Centennial should have been allowed a graceful retreat, by redrafting its policy so as to make it clear that, notwithstanding its liberal access policy toward community groups, the school facilities were not an open public forum. As this Court has held, a state is "not required to indefinitely retain the open character of the facility." *Perry, supra*, at 46.[12]

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12. Although Centennial never regarded its high school and elementary schools as open public forums, it did comply with the District Court's preliminary (Cont'd)

4. *The Nature and Function of the Forum.* "The public schools do not possess all of the attributes of streets, parks, and other traditional public forums." *Hazelwood School District v. Kuhlmeier, supra*, 484 U.S. at 267. This Court has held that when a school district maintains only a nonpublic forum, the school may "disassociate itself" from speech for almost any reasonable purpose, including the maintenance of neutrality, even when the speech concerns core First Amendment issues. The school may therefore disassociate itself from "any position other than neutrality on matters of political controversy." *Id.* at 570.

The Court's factual analysis in *Perry Education Association, supra*, goes to the very heart of the dispute in this case. The school district in *Perry* allowed its facilities to be used by groups of exactly the same character as those granted access to the Centennial School District facilities: "outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations." *Perry, supra*, 460 U.S. at 47. The Court flatly held, however, that *"[t]his type of selective access does not transform government property into a public forum." Id.* (emphasis added). *See also Greer v. Spock, supra*, 424 U.S. 828, 838 n. 10 (1976) (Opening of military base to civilian speakers and entertainers did not make base an open public forum).

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(Cont'd)
injunction order, and then proceeded in good faith to "return to the drafting board" to cure whatever constitutional violations the District Court had thought existed. As Judge Stapleton emphasized in his dissent below, there is absolutely no evidence that Centennial has been inconsistent, insincere, or disingenuous in its behavior under the new policy. Slip op. at 40-41 (Stapleton, J., dissenting). Thus, even if a constitutional violation had existed — a premise that Centennial strenuously denies — the permanent injunction violates the general principle of constitutional jurisprudence that the scope of federal equitable relief should not extend beyond what is necessary to correct the violation. *Cf. Pasadena City Board of Educ. v. Spangler*, 427 U.S. 424 (1976).

The character of Centennial's building uses is thus functionally identical to the building uses in *Perry*, and indeed to the uses typical of most school districts in the United States. Certainly every school district in the country need not close its auditoriums, athletic fields, classrooms, cafeterias, and other facilities to the Cub Scouts, Brownies, Kiwanis, Lions, and local adult education groups, in order to avoid opening itself up to a first-come-first-serve open forum policy in which fractious political and religious speech of every kind must be permitted. The First Amendment should not relegate the nation's schools to such an all or nothing dilemma. This Court should clarify public forum law by declaring that a middle ground exists: schools may admit nonpartisan youth, community and civic groups without triggering open forum principles.

## CONCLUSION

For the foregoing reasons, petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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# APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Filed: June 22, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 89-1658/1692

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GREGOIRE, HARRY,
URBANY, DAVID,
IRWIN, SCOTT and
DIETSCH, HERMAN and
MILLER, RICH and
CAMPUS CRUSADE FOR CHRIST, INC.

vs.

CENTENNIAL SCHOOL DISTRICT and
WHITE, RONALD Y., in his official
capacity as Supervisor of
Secondary Education for the
Centennial School District

Centennial School District,

Appellant in No. 89-1658

GREGOIRE, HARRY,
URBANY, DAVID,
IRWIN, SCOTT and
DIETSCH, HERMAN and
MILLER, RICH and
CAMPUS CRUSADE FOR CHRIST, INC.

Appellants in No. 89-1692

*Appendix A*

vs.

CENTENNIAL SCHOOL DISTRICT and
WHITE, RONALD Y., in his official
capacity as Supervisor of
Secondary Education for the
Centennial School District

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Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 87-6679)

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Argued
January 31, 1990
Before: STAPLETON and MANSMANN,
*Circuit Judges* and
KOSIK, *District Judge**

(Filed June 22 , 1990)

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* Honorable Edwin M. Kosik of the United States District Court for the Middle District of Pennsylvania, sitting by designation.

*Appendix A*

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**OPINION OF THE COURT**

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MANSMANN, *Circuit Judge.*

In these cross appeals we are asked to resolve a direct conflict, of constitutional proportions, between a public school district and a religious organization, over the use of school facilities. The dispute comes to us from a final order of the district court granting a permanent injunction which enjoined the Centennial School District from

refusing to open the facilities of the William Tennent High School to groups wishing to engage in religious speech. Centennial appeals the grant of this permanent injunction, claiming that it is not constitutionally required to open its facilities and, in fact, is mandated by the establishment clause to exclude at least certain types of religious speech. The beneficiary of the permanent injunction ("Student Venture") cross appeals on the ground that the district court stopped short; it contends that the district court erred when it did not include worship and distribution of religious literature within the mandate of the injunction. Because we find that Centennial, by its policy and practice, created a designated open forum and that the establishment clause is not violated by Student Venture's use of the school facilities, we will affirm the grant of the permanent injunction and will remand this matter to the district court to modify the injunction to include these additional categories of speech.

I.

This dispute arose when Student Venture, an evangelical Christian Youth Organization which is a subsidiary of the Campus Crusade for Christ, Inc., was denied permission to rent the auditorium of the William Tennent High School for the evening of October 31, 1987. Student Venture sought use of the auditorium for a performance of a well-known illusionist/magician, Andre' Kole. Kole often appears as a traveling representative for Campus Crusade. He performs and then, after an intermission when anyone may leave, he delivers an account of his investigation of the miracles of Christ and how his discovery that Jesus Christ was who he claimed to be changed the course of Kole's life.

*Appendix A*

The Centennial School District denied Student Venture's request to use the auditorium, citing School District Policy 6.2.D which stated that "Pennsylvania law specifically prohibits the use of school facilities for religious services, instruction, and/or religious activities."[1] Student Venture then filed suit in the U.S. District Court for the Eastern District of Pennsylvania, claiming that denial of the use of the facility violated its first amendment freedoms of speech and assembly, the fourteenth amendment's equal protection clause, and both the free exercise and establishment clauses of the first amendment.

On October 28, 1987, the district court issued a preliminary injunction enjoining Centennial from refusing to rent public school facilities to groups or individuals solely because of the religious content of their speech. Centennial was also enjoined from refusing to rent to Student Venture and the Kole performance went forward on October 31st.

The district court's issuance of the preliminary injunction was based on the conclusion that Centennial had created an "open forum" for free speech and assembly at its school facilities by renting them to a wide range of community groups. Given this open forum, Centennial could not refuse to rent to a group solely because of the religious content of the group's message. *Gregoire v. Centennial School District*, 674 F. Supp.172, 179 (E.D. Pa. 1987) *aff'd without opinion, Appeal of Centennial School Dist.*, 853 F.2d 917, 918 (3d Cir. 1988).

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1. This statement was apparently premised on the establishment clause of the Pennsylvania state constitution. On appeal Centennial does not base any part of its argument on Pennsylvania law.

*Appendix A*

On March 8, 1988, Centennial revised its guidelines for facilities use. The new policy purports to limit access to those organizations, groups, and activities which are compatible with the mission and function of the school system. The revised policy does not permit the use of high school facilities for religious services and imposes a ban on the distribution of religious literature.

On the ground that it would request use of the Centennial facilities again for religious purposes, Student Venture sought to have Centennial's facilities use policy enjoined and a permanent injunction issued prohibiting Centennial from preventing its access to school facilities based on the religious content of its message. The district court granted permanent injunctive relief on November 30, 1988, relying again on the open-forum analysis; *Gregoire v. Centennial School District*, 701 F. Supp. 103 (E.D. Pa. 1988). Centennial appeals from this final injunctive order.

Following the grant of injunctive relief, Student Venture filed a Motion for Clarification in the district court, asking that the court's order be amended to enjoin Centennial from prohibiting religious "worship" as well as religious "speech" and from barring distribution of religious literature at school facilities. On July 25, 1989, the district court denied this motion and Student Venture appeals.

These appeals require that we resolve complex issues of constitutional law, balancing a claimed violation of first amendment rights against a substantial first amendment defense. Where, as here, the facts are not in dispute and the parties challenge the choice, interpretation, and application of legal precepts, our review is plenary. *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669

F.2d 98, 101-02 (3d Cir. 1981). Recognizing that our decision will have significant import for school districts throughout this circuit, we turn to the issues presented on appeal.

II.

There is no question that religious discussion and worship are forms of speech and association protected by the first amendment. *Widmar v. Vincent*, 454 U.S. 263 (1981). There is also no question that Centennial seeks to exclude Student Venture and other religious organizations from its facilities based on the content of their speech.

We recognize at the outset that a school district is under no obligation to open its facilities to expressive activity by outsiders. "The state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Perry Educ. Assn. v. Perry Local Educator's Ass'n.*, 460 U.S. 37, 46 (1983). It is when the government opens facilities not generally available to the public that legal questions relating to equal access arise.

This established, we turn our focus to the issue at the very center of this litigation: what are the legal characteristics of the forum created by the school district at William Tennent High School? Limitations which the government may lawfully place on classes of speech vary, depending upon whether the relevant forum is determined to be a traditional open forum, a public forum created by government designation or a non-public forum.

The "traditional public forum" has been defined in terms of places such as streets or parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating

thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). Regulation of speech in a traditional public forum must pass muster under a strict scrutiny analysis; the regulation must be narrowly drawn to serve a compelling state interest. *Carey v. Brown*, 447 U.S. 455, 461 (1980).

A "designated open public forum" is created when public property is intentionally opened by the state for indiscriminate use by the public as a place for expressive activity. A state is not required to maintain the open character of the facility indefinitely. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983). While the facility is open, however, content-based regulation of speech is subject to the same strict scrutiny analysis applied in the traditional public forum.

The third forum category recognized in the first amendment context is the "non-public forum." This forum exists when publicly-owned facilities have been dedicated to use for either communicative or non-communicative purposes but have never been designated for indiscriminate expressive activity by the general public. *United States Postal Serv. v. Council of Greenburgh*, 453 U.S. 114 (1981). Content-based regulation in this category is examined under the "reasonable nexus" standard. "Control over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 807 (1985).

Neither party before us argues that the William Tennent High School facilities constitute a traditional public forum. The parties join issue

over whether Centennial has created a designated open forum, thus implicating strict scrutiny of its decision to exclude Student Venture, or whether it has, instead, maintained a closed forum in its high school facilities from which content-based exclusions may be made so long as there is some rational basis for the exclusion. Centennial argues that elementary and secondary schools occupy a unique status for purposes of the first amendment and that courts have been reluctant to characterize either as an open forum.

In order to resolve this conflict, we look to those cases in which courts have undertaken public forum analysis to fix the appropriate standard of constitutional review. While the parameters of the public forum doctrine are, at the edges, imprecise, we believe that the line of cases in which this doctrine has been developed and applied requires a finding that Centennial has created a designated open forum in the William Tennent High School facilities and that its content-based exclusion of Student Venture's expressive activities must be examined against the strict scrutiny standard.

III.

The Supreme Court in *Perry* and in *Cornelius* validated the use of forum analysis to achieve a balance between the government's interest in limiting the use of its property and the interests of those seeking access. *Cornelius*, 473 U.S. at 800. In these cases, the Court identified several factors to be considered in determining whether a particular forum should be categorized as open or closed. We first examine these factors in general terms in order to establish a framework for the evaluation of this case.

The first relevant factor is governmental intent.

We must evaluate "the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Id.* at 803. The nature of the property and its compatibility with expressive activity provide additional information bearing on intent. *Id.* at 802 (intent to create a public forum will not be inferred when the nature of the property is inconsistent with expressive activity).

A second factor relevant to categorizing a forum as open or closed is the extent of use granted. We must determine, by examining Centennial's policy and practice, whether use of its facilities is open to "all comers" or whether it has been limited by well-defined standards tied to the nature and function of the forum. *Perry*, 460 U.S. at 46-47.

Consistency in granting or refusing access to the forum is also important to proper classification. Any permission procedure and its application to similarly situated speakers must be considered in evaluating consistency. *See Cornelius*, 473 U.S. at 804-05 (consistent application of requisite permission procedure and lack of evidence suggesting that granting permission was merely ministerial were factors in finding closed forum).

Using the Supreme Court's forum guidelines as a framework for analysis, we turn to the facts of this case in order to determine whether the district court erred in concluding that Centennial created a designated open forum in the facilities of the William Tennent High School.

IV.

A.

Our first focus in categorizing the forum is on

the school district's intent in opening its high school facilities to outside groups.[2] Both *Perry* and *Cornelius* make clear that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." *Cornelius*, 473 U.S. at 802. We are directed to examine Centennial's policies, its practice, the nature of the high school property, and the compatibility of the property with expressive activity in order to determine the government's intent. *Id.* We turn first to Centennial's facilities use policy.

The policy in effect at the time of Student Venture's application for rental listed the following groups as qualifying for use of Centennial's facilities without charge:

1. community youth groups under proper supervision,
2. staff groups,
3. home and school and/or parent/teacher associations,
4. civic and cultural organizations, and

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2. Although Student Venture has, in the past, sought access only to the high school auditorium, the parties have consistently defined the relevant forum to consist of all of the facilities at the William Tennent High School. Since Student Venture claims a right to general facilities access, our discussion presumes the adoption of the parties' definition. "When speakers seek general access to public property, the forum encompasses that property." *Cornelius*, 473 U.S. at 800. We note that the dissent does not adopt Centennial's definition of the relevant forum as "all the school property" but argues instead that there are several relevant fora, completely distinct from each other and implicating different legal precepts.

5. booster organizations.

Other organizations were able to use school facilities on payment of a fee. Pursuant to this policy, Centennial granted building access to over sixty-five groups, including the Bloodmobile, scouting groups, YMCA, cheerleaders, dance groups, twirlers, the symphony, and to other groups for testing and photography sessions. The building was also used as a meeting place for parent groups, the County Board of Elections, and at least two labor unions. Adult education and college classes were held in the school classrooms in the evening. Centennial summarized use of its high school facilities during the 1986-87 school year as follows:

> From the foregoing it can be seen that the facilities of the Centennial School District continue to be used extensively by the community. . . . The buildings and grounds of Centennial will continue to be made available to all groups in accordance with the [facility use policy].

The only explicit *exclusion* to this wide access policy was found in Regulation B.17 which imposed a ban on the use of school facilities for religious purposes. Despite this prohibition, Centennial permitted religious courses in its adult education program, offering instruction in many areas including metaphysics and meditation, psychic abilities, tarot, and parapsychology.[3]

It was while this policy was in effect that

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3. Student Venture notes the decision in *Malnak v. Yogi*, 440 F.Supp 1284 (N.J. 1977) *aff'd per curiam*, 592 F.2d 197 (1979), which held that transcendental meditation is religion which, when taught to high school students as a part of the curriculum, violates the establishment clause.

*Appendix A*

Student Venture sought and was denied access to the high school auditorium based on the religious content of its proposed message. Student Venture then sought a preliminary injunction which was granted by the district court.

Pending consideration of a permanent injunction, Centennial revised its facilities use policy. This revised policy, in effect at the time of the district court's issuance of the permanent injunction, is still in use.

This current policy permits the following groups, among others, to use its facilities:

> Centennial resident civic, cultural and service organizations having a majority of Centennial resident membership and/or an on-going connection with the Centennial community.
>
> a. Civic: Centennial neighborhood associations organized for the purpose of discussion of neighborhood affairs.
>
> b. Cultural: Centennial resident music, artistic, player associations organized for the purpose of rehearsal, performance of music compositions, plays or art displays.
>
> c. Centennial Resident Service Organizations: Rotary, Kiwanis, Lions, Jr. Chamber of Commerce and like non-sectarian service organizations.

The policy also permits school facilities to be used by "community based employee associations and labor unions (limited to members only) for meetings only" and "commercial profit making ventures which charge admission or sell tickets for the staging of plays and/or musical performances suitable for general audiences." Adult education

and college classes are also conducted at the school. The revised policy states that "persons or groups seeking an 'open forum' for free expression of ideas may make special arrangement to rent classroom space. . . . to teach such ideas in an objective manner through the Evening School Director."[4]

Section V of the revised policy also creates a limited open forum immediately after school for student participation in accordance with the terms of the Equal Access Act, 20 U.S.C.A. §§ 4071 et. seq.[5] The policy reads in part:

> A. Student Participation
>
> A 'limited open student forum' (meeting) may be requested by any secondary student or students enrolled in the Centennial school district who desire(s) to voluntarily initiate a meeting . . . in order to peacefully and with appropriate decorum discuss religious, political, philosophical or other topics which are not related to the curriculum, and wherein the School District or its employees will not be involved in any way in such sponsorship or discussion . . . .

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4. The policy specifically creates an open forum for evening adult education classes.

5. This appeal does not present a challenge to the constitutionality or scope of the Equal Access Act. The parties do not base their arguments on the Act and our analysis does not turn on the Act *per se*. We note, however the Supreme Court's recent decision in *Board of Education v. Mergens*, ___ S.Ct. ___, 1990 WL 71442 (U.S.). While the case before us involves issues not directly controlled by *Mergens*, we find the Court's logic instructive.

*Appendix A*

B. Non-School Person or Non-School Group Participation in the Limited Student Forum

1. No non-school person or non-school group shall be admitted to any limited open student forum without the written invitation and consent of the student or students initiating the meeting and advance school board approval . . . .

2. Any non-school person or non-school group seeking to participate in any way in the open student forum shall provide the required certificate of insurance. . . .

While the revised policy explicitly provides for religious discussion in several contexts, it also retains clauses purporting to exclude certain categories of religious speech:

c. In any event, religious service (defined to include the invocation of, worship to, prayer to, or adoration of a diety [sic]) is prohibited.

d. The sale or distribution of Bibles, testaments, scriptures or religious literature is prohibited.

Although Student Venture programs such as the Kole performance arguably do not fall within the specific ban of the new policy, Centennial has effectively excluded these by including in its policy clause "(1c)" which effectively denies auditorium rental to non-profit and charitable organizations. Centennial admits that this "non-profit" language is designed to exclude programs such as the one previously sponsored by Student Venture.

Centennial contends that its policies clearly establish that it did not intend to designate an open forum in its high school facilities. Centennial argues that while it has created limited fora in

certain contexts, its overall policy evinces a clear intention to maintain a closed forum with facilities access restricted to those groups whose purpose is consistent with the educational mission of the school and its functional place in the community. Centennial asserts that this intent, as expressed in its policy, must weigh in favor of our finding a closed forum at William Tennent High School.

While the Supreme Court in *Perry*, and *Cornelius* opined that intent, as evidenced by a government's statements, is a factor to be considered in forum classification, it also made it clear that the forum inquiry does not end with the government's statement of intent. To allow, as would the dissent, the government's statements of intent to end rather than to begin the inquiry into the character of the forum would effectively eviscerate the public forum doctrine; the scope of first amendment rights would be determined by the government rather than by the Constitution. Any forum classification must be rooted in the facts of the particular case; forum classification "should be triggered by what a school does, not what it says." *Board of Education v. Mergens*, 1990 WL at 11-12 (quoting 130 Cong. Rec. 19222 (1984) (statement of Sen. Leahy)). *Cornelius* and *Perry* direct that we look, therefore, not only at what Centennial says in its policy but at how that policy has been applied. Policy *and* practice are relevant in determining the government's intent. *See*, *Perry*, 460 U.S. at 37 and *Cornelius*, 473 U.S. at 802.

Centennial contends that, despite having granted access to many diverse groups, it did not intend to create an open forum; it created instead a closed forum with access properly restricted to those groups whose purpose is consistent with the educational function and mission of the school.

*Appendix A*

Centennial takes the position that the first amendment is not offended by reasonable content classifications rationally related to this mission. In formulating this argument Centennial relies primarily on *Perry*. In *Perry*, the school district granted access to the interschool mail system and teacher mailboxes to the teachers' duly elected bargaining representative while denying access to a rival union. The school district had allowed the mail system to be used by parochial schools, church groups, the YMCA and cub scout groups. The Supreme Court concluded that the school mail facilities constituted a closed forum and upheld the school district's content-based regulation on the use of the facilities.

Centennial argues that the access it grants to outside groups is limited to groups "of exactly the same character" as those in *Perry*. It has, it says, limited a non-public forum to activities compatible with the intended purpose of the property. The content-based classification imposed is said to be necessary to preserve neutrality in the public school setting. Centennial argues in its brief that "[s]chools have a powerful interest in rising above religious and political contests. . . . [S]chools must jealously guard against both the practice and appearance of religious, racial or political partisanship."

We recognize the accuracy of Centennial's conclusions regarding appropriate content restrictions in a closed forum but believe, however, that the breadth of access granted by Centennial in its current policy exceeds that of *Perry* and undercuts Centennial's contention that it has granted access only to those groups compatible with the school's educational mission.

While it stresses the need for religious and political neutrality, Centennial has opened its evening program to religious discussion and has granted access to politically active groups, such as neighborhood associations, labor unions and civic organizations such as the Rotary. Centennial has also opened its doors to dramatic and musical performances by commercial profit-making ventures. These performances are not required to relate to school or civic purposes. Civic organizations, which have taken stands on politically divisive issues, are also permitted to meet at the high school. The definition of the groups falling within the "educational mission of the school" is so vague that Centennial has virtually unlimited discretion in deciding which groups qualify and which do not. The term "civic" can be stretched or contracted to fit whatever the school district decides. The Court in *Mergens* outlined the problems associated with definitional overbreadth in the context of the Equal Access Act. We believe that the Court's conclusions, although confined to the Act, bear on the issue raised here:

> Allowing . . . a broad interpretation of 'curriculum-related' would make the [Act] meaningless. A school's administration could simply declare that it maintains a closed forum and choose which clubs it wanted to allow by tying the purposes of those clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content.

*Mergens*, 1990 WL at 12 (quoting *Mergens v. Board of Education*, 867 F.2d 1076, 1078 (8th Cir. 1989)). If the concept of a designated open forum is to

retain any vitality whatever, the definition of the standards for inclusion and exclusion must be unambiguous and definite. The clear category of groups or clear category of subject matter required in a closed forum is absent here, violating the mandate of *Perry* and the reasoning in *Mergens*. While it disavows an intent to create an open forum Centennial has, in reality, opened its doors to those groups substantially outside what is commonly thought of as the educational mission of the school and has gerrymandered Student Venture out of Centennial facilities solely on the basis of the religious content of its program. "A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against a particular . . . group on the basis of the content of the speech of that group." *Id.*

While the policy contains a permission procedure which might suggest that gerrymandering has not occurred and that substantive content-screening takes place, the record is devoid of evidence showing that any group other than Student Venture has ever been denied access to school facilities. The district court noted the lack of a clear standard for granting or denying access when it wrote:

> Here, defendant has opened the school facilities for general use by community groups that have the widest definitional range in its stated policy and, indeed, by concluding the list of eligible groups in their priority of use sequence by using the term "others," it can be presumed that there is virtually no limit on the groups that could apply for use of the buildings, subject, of course, to standards

> having to do with the protection and the security of persons, property, and the preservation of public resources committed to the school district. The school facilities here, subject only to the limitations of hours, administrative requirements of filing an application and paying the fees and costs, and conforming to the general standards regarding use that would not cause injury or damage to persons or property, though definitionally "limited," are for all intents and purposes a public forum from the vantage point of the protection of first amendment rights of free speech and association.

*Gregoire*, 674 F. Supp. at 177. The district court's conclusions were unaffected by the mid-litigation policy revision:

> Although Centennial claims in its papers before this court that its 'new forum' is no longer a forum open to the general public, a reading of the new policy demonstrates that Centennial has, despite its declared intention, adopted as its new policy another open public forum, as that term has meaning in the constitutional sense.

*Gregoire*, 701 F. Supp. at 106.

In reaching this conclusion, the district court relied, in part, on the reasoning of the Supreme Court in *Widmar*. There the Court ruled that where the University of Missouri at Kansas City had officially recognized over 100 student groups and had given them access to university facilities, it had created a designated public forum. The university could not, therefore, exclude a student religious organization without a showing that the exclusion was necessary to serve a compelling

state interest and narrowly drawn to achieve that end.

Centennial argues that *Widmar* does not control here. First, Centennial contends that where the University in *Widmar* intended to create an open forum but believed that it was constitutionally required to exclude religious groups, Centennial never intended to create an open forum but instead sought to limit access in accordance with the particular function of the secondary school.

Throughout the course of this litigation Centennial has refined and narrowed its position, arguing that despite the breadth of access granted, it has consistently evaluated each applicant against a definable standard relating to the function and mission of the school. Centennial's distilled position is that the critical factor separating Centennial from other users is not religion per se. The exclusion is based, not on the religious nature of Student Venture's speech, but on the element of conversion and the attempt to influence students inherent in the Student Venture program. Centennial asserts that it is this conversion element that sets Student Venture's speech apart from the wide spectrum of other speech permitted at William Tennent High School; its message alone is directed to students and is said to have this conversion component. Expressive activity by other groups is limited to the members of those adult groups or classes and, therefore, has no tendency to influence high school students toward a particular point of view. Centennial argues that it grants access to most groups because most groups do not have a conversion message. Limiting access to those groups not engaging in conversion speech, Centennial contends, is especially important in the

secondary school where a conversion message is likely to undermine the school's interest in neutrality and to have an undue influence on impressionable youth.

Centennial argues that when its access policy and practice are viewed in light of this narrow criterion for exclusion, the wide access granted to other groups does not undermine its position that it maintains a closed forum with access tied to the purpose and mission of the school. The mission of the school in this view is one of preserving an image of neutrality *vis-à-vis* impressionable students and concerned parents. While this argument has a ring of logic, the facts of this case just do not support it.

When we view the school's access policy and practice in terms of this now narrowly defined criterion of exclusion, we note that, consistent with its definition of the school's mission, Centennial has supported religious speech in a number of contexts. Religion may be the theme of dramatic or musical productions, so long as these productions are not sponsored by a non-profit or charitable organization. Most critical to our evaluation of Centennial's purported reasons for excluding Student Venture is the fact that Centennial has also created an open forum for religious discussion in its evening classes *and* in the afternoon student activity period *to which outsiders may be invited*. Presumably, Andre' Kole could come to the student open forum and present exactly the same program as that which is the subject of this litigation. What a student may not hear in the auditorium on a Saturday evening he may, consistent with Centennial's policy, hear in a school classroom with school staff present, immediately after classes. It is illogical to suggest

that religious speech which is consistent with the mission and purpose of the school in the afternoon must be excluded as inconsistent when it takes place on a Saturday evening in the school auditorium.[6]

We note, too, that Centennial's policy does not support its contention that it has evaluated or made an effort to evaluate access requests in accordance with the newly articulated conversion criterion. By the terms of the policy, rental of school facilities is closed to all religious groups, regardless of the lack of a conversion message. Unlike neighborhood associations, civic groups, and labor unions, members of religious groups are denied the right to use school facilities to speak and meet with each other.[7] As we have noted, the

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6. The conversion element of Student Venture's speech is not clear from the record. It appears that Andre' Kole performed his acts of illusion and, after an intermission, told of his investigation of the miracles of Christ and delivered a personal account of how he had come to his faith. There was no altar call or overt commitment sought. In support of its conversion argument, Centennial relies primarily on Student Venture's amended complaint in which Student Venture admits evangelical Christian beliefs and characterizes the Kole program as one designed to entertain and present the Christian gospel message.

7. We take issue with the dissent's conclusory statement that "Centennial has a rational basis for distinguishing between the use of school facilities by Student Venture and their use by local special interest groups consisting of district residents whose families pay the tax bills . . . . *While Student Venture has resident members*, it is not an organization whose purpose is to serve the needs of the residents of the school district." Dissent typescript at 14 (emphasis added). This assessment of which organizations, labor unions, neighborhood associations, or religious groups, serve the "needs" of the Centennial school district is value laden and does not find support in the record.

policy explicitly prohibits, with certain notable exceptions, non-profit and charitable organizations from renting its facilities.[8] This policy provision thus reaches not only potentially divisive speech to students which might be said to impair the neutrality interest of the school, but also excludes speech to students or other audiences which does not contain a conversion element and may be highly relevant to the school's education program.

B.

Despite the imprecise drafting and application of its policy, and the fact that outsiders may, consistent with policy, present information similar to that conveyed by Student Venture in after school activity periods, Centennial argues that we are precluded from finding that it intended to create a designated open forum because the facilities in question are those of a public secondary school.

We recognize that the nature of the property and its compatibility with expressive activity are factors bearing on intent and that many public forum decisions have been grounded on these factors. There can be no real dispute, however, that the school facilities, after-hours, are compatible with expressive activity. A vast amount of expressive activity takes place now and has taken place in these facilities. The question becomes, then, whether there is something about the nature of the public secondary school which invalidates the district court's forum conclusions.

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8. The dissent's conclusion that most non-profit and charitable organizations would seek facilities access solely to proselytize or raise funds is, in our view, misplaced, and fails to take into account the public education function often served by these groups.

Centennial argues that the district court erred in extending *Widmar* to the secondary school setting. *Widmar*, it contends, has no application outside the university. In support of this proposition, Centennial cites our decision in *Student Coalition for Peace v. Lower Merion School Dist.*, 776 F.2d 431 (3d Cir. 1985).

In *Student Coalition*, the school board refused to allow a group of students to hold a peace fair on one of the school's athletic fields although the board had allowed non-school groups to conduct Memorial Day and athletic events on the field. We found that no public forum had been created by these limited other uses and that the board's desire to avoid the appearance of political favoritism was valid justification for limiting speech in this non-public forum. We grounded our decision on the facts of that case and found that the school board had not opened the property to public use so as to create a limited forum. We did not take the position that a public forum could not be created in a secondary school, i.e., that a *Widmar* open forum could not exist in a secondary school facility. Instead, we undertook the same forum analysis set forth here and, on different facts, with much more limited access, found that no public forum had been created.[9]

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9. Just as this case is not *Lower Merion*, it is not, as the dissent argues, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), nor does *Lehman* undermine our conclusions regarding the forum here. The Court's decision in *Lehman* supports the proposition that the nature of the property and its compatibility with expressive activity are important in determining intent. *Lehman* had little to do with the different types of speech allowed but everything to do with the nature of the property. The Court in *Lehman* found that the city, rather than creating a public forum, was engaged in

While public secondary schools in general may not possess many of the characteristics of a traditional public forum, the William Tennent High School does, as a result of school board action, resemble a university in some critical ways. Indeed, Centennial has freely granted its students access to school facilities co-extensive with those available to university students in *Widmar*. Thus we find nothing about this secondary school per se to invalidate the method of forum analysis employed in *Widmar*. In light of the Supreme Court's decision in *Mergens* it is now clear that a secondary school may, by its acts, create a public forum implicating the same constitutional rules set forth in *Widmar*.[10]

V.

On the facts of this case, we find that the Centennial school district has created a designated

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commerce and the restriction on political advertising was incidental to that effort. The Court found that during the twenty-six years of public operation, the Shaker Heights system had *never* accepted the public issue or political advertising on the ground that its revenue could be jeopardized, the advertising might offend a captive audience, and favoritism concerns could arise *in the context of allocating limited space*. The rationale underlying the decision in *Lehman* does not, in our view, extend to this case.

10. *See* also *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1988) (nothing precludes existence of public forum in a high school setting although the public forum in unlikely); *Thompson v. Waynesboro Area School Dist.*, 673 F. Supp. 1379 (M.D. Pa. 1987), *affirmed by an equally- divided court*, (No. 88-5235, 3d Cir. May 31, 1989) (high school created limited public forum restricted to student groups); *Country Hills Christian Church v. Unified School District*, 560 F. Supp 1207 (D. Kan. 1983) (open forum created in elementary school).

open forum for speech such as that presented by Student Venture. We arrive at this conclusion having examined each of the factors integral to public forum analysis as identified in *Perry*, *Cornelius* and *Widmar*.

We do not believe that these cases require that we give conclusive effect to Centennial's contention that it maintains a closed forum. We cannot conclude that, because there is new exclusionary language in the wording of the revised policy, we are precluded from finding that the school district has created a designated open forum. If this is, indeed, what *Cornelius* requires, there is no longer a place in the law for the concept of the designated open forum; the government may, upon the most tenuous and internally inconsistent grounds, pick and choose those to whom it grants access for purposes of expressive activity simply by framing its access policy to carve out even minute slices of speech which, for one reason or another, it finds objectionable. We do not read either *Perry* or *Cornelius* as sounding the death knell for the designated open forum.

When Centennial originally sought a preliminary injunction seeking to bar Student Venture from use of its high school auditorium, it had in force a comprehensive facilities use policy which imposed a ban on the use of school facilities for religious purposes.[11] Despite this limiting language in the policy, the district court found that Centennial had created a designated open forum. As the dissent points out, "as a result of its finding of indiscriminate permission to use school

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11. While the dissent characterizes this policy as "sketchy" the document consisted of some eleven pages detailing the terms under which facilities access would be permitted.

facilities, the district court *properly concluded* that Centennial could not exclude Student Venture from using the auditorium . . . in the absence of a compelling state interest." (Emphasis added.)

Centennial's mid-litigation revision of the facilities use policy in practical terms changed nothing. If it was correct for the district court to find that the grant of indiscriminate access to school facilities created an open forum under the old policy, it is inconceivable that the virtually identical, arguably expanded, access granted under the new policy would not lead to the same result. Centennial's changed wording and strategic description of existing groups do not hold for us the magic which, in the view of the dissent, transforms the identical practice from unacceptable to acceptable.

We have weighed Centennial's overt statements of intent, its policy, its practice of granting access pursuant to that policy, its consistency in applying the standards purportedly embodied in the policy, the reasoning underlying its grant or denial of access and the nature of this particular secondary school and its compatibility with the speech proposed here. On the basis of these factors, we conclude that, as to speech of the type embodied in the Kole performance, Centennial has not created a closed forum in the constitutional sense. The forum created is open and encompasses speech of the same character as that permitted in the afternoon student open forum periods.

While we do not take issue with the idea that speech which is appropriate and permissible in some public school contexts may be appropriately excluded from other contexts, we do believe that Centennial's assumptions in opening its limited afternoon student forum and in permitting

religious speech in other contexts bear on our analysis here. It is not the existence of religious discussion in some contexts per se which leads us to our holding. It is, instead, that the assumptions underlying the tolerance of religious speech in other contexts, particularly in the afternoon student forum, undercut the rationale advanced by Centennial for excluding religious speech from the high school auditorium during non-school hours.

In concluding that Centennial has not maintained a closed forum, we emphasize that the basis of our holding is narrow. Centennial must be consistent in granting facilities access: where it permits potentially divisive or conversion-oriented speech by outsiders to a student audience in school facilities in the afternoon and determines what this speech is consistent with the function and mission of the school system, it cannot, on maturity or "mission" grounds, exclude the same type of speech directed to the same audience from its facilities in the evening. Where it identifies student-directed conversion speech as its criterion for exclusion, it cannot reasonably allow some members of some groups to meet with each other and deny access to others whose speech does not implicate this conversion element.

VI.

As we have noted, content-based regulation of speech in an open forum must satisfy the strict scrutiny test. *Cornelius*, 473 U.S. at 802-3. An exclusion must be necessary to serve a compelling state interest and be narrowly drawn to achieve that end. Centennial claims that its exclusion of Student Venture withstands strict scrutiny analysis in that the exclusion is necessary to comply with the establishment clause of the

United States Constitution. In making this argument, Centennial attempts to distinguish *Widmar*.

In considering whether a student religious group could be granted access to university facilities without violating the establishment clause, the Supreme Court in *Widmar* referred to the University of Missouri campus as "a forum generally open to the public," 454 U.S. at 268. It held that the University could open its doors to religious student groups without offending the establishment clause, concluding that university students were young adults and were "less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." *Id.* at 274 n.14.

Centennial here again argues that *Widmar* has no automatic application in the secondary school setting and that an action innocent at the university level may violate the establishment clause in the lower grades. Centennial sets forth in its brief that *Widmar* principles should be confined to the university setting, relying primarily on an asserted impressionability of the "children in the audience" at the Kole performance for whom the magic act is a "lure." By upholding the constitutionality of the Equal Access Act which extended the principles of *Widmar* to secondary school student groups, the Supreme Court in *Mergens* has determined that the establishment clause does not prevent secondary school groups from meeting on school property immediately following afternoon classes. We must now determine whether the establishment clause concerns are somehow different where a religious organization is permitted to rent a secondary

school auditorium during non-school, weekend, hours.

Establishment clause questions are governed by the three-prong test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). To pass constitutional muster, the governmental policy "must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the policy must not foster excessive government entanglement with religion." *Id.* at 612-613. The *Lemon* test may be applied more or less strictly depending upon the educational setting in which the speech arises. Trial courts must be "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). The emphasis in *Aguillard* parallels that in *Widmar*: younger students are impressionable, schools play an inculcation role and families entrust public schools with the education of their children, expecting schools to maintain religious neutrality.

We must determine whether, on the particular facts before us, *Widmar* would not control and that granting Student Venture access to the school auditorium would violate the establishment clause. We turn, then, to the *Lemon* test.

It is undisputed that in establishing its facility use policy and in granting access to a wide spectrum of outside groups, Centennial had no religious objective or nonsecular purpose. The first prong of the *Lemon* test is satisfied.

We next consider the second prong of the *Lemon* test, i.e., whether allowing access to Student Venture would have the effect of advancing religion. It is on this prong that Centennial rests

its establishment clause defense. Centennial contends that its interest in maintaining a position of neutrality *vis-à-vis* its students and their parents would be fatally compromised by allowing Student Venture access to the high school auditorium; its students are too impressionable to understand that allowing Student Venture to rent school facilities does not imply Centennial's endorsement of the message presented. "[I]t is crucial that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). We believe that *Widmar* and *Mergens* are relevant in evaluating Centennial's establishment clause claim.

We note first *Widmar's* conclusion that, in the university setting, granting a religious organization permission to use school facilities does not imply an endorsement of religious goals. In reaching this conclusion, the Court stressed the free access given to a broad spectrum of groups. This was seen as an "important index of secular effect." 454 U.S. at 274. In *Widmar*, the second prong of the *Lemon* test was satisfied.

We believe that it is satisfied here as well. Where groups seeking access to the high school facilities are treated equally, the message communicated "is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Mergens*, 1990 WL at 14.

By voluntarily creating a limited open forum for students in school facilities, immediately following school hours, with school monitors present, and allowing these same students to invite outsiders

to be present, Centennial has made a decisive judgment concerning the maturity of its high school and junior high school students and their ability to understand that granting access to a group does not imply endorsement of the message presented.[12] Having made this maturity judgment about its students in a context where there are arguably strong indicia of school sponsorship, Centennial cannot now be heard to assert a lack of student maturity where the connection between the school and the event is far more attenuated. Student Venture's proposed use of the auditorium is occasional only, is directed to high school students, and would take place during the evening hours.[13] In this context, we believe that Justice O'Connor's language in the plurality portion of the *Mergens* opinion is apposite:

> [T]here is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate. Moreover, petitioner's fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students. To the extent that a school

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12. The impressionability argument, even if it were persuasive in this context, cuts two ways. If we presume, as Centennial would have us do, that students and parents are incapable of understanding the lack of endorsement when equal access is granted, it is at least as likely that they will misapprehend the exclusion of religious speech as discrimination against religion.

13. Our conclusions here are confined to the forum at issue. The concern expressed in the dissent concerning possible uses of elementary school facilities within the Centennial school district as a result of this opinion is without foundation.

> makes clear that its [allowing use of its facilities] is not an endorsement of the views of the . . . participants, students will reasonably understand that the school's [granting access] evinces neutrality toward, rather than endorsement of, religious speech.

1990 WL at 16 (citation omitted).

We also adopt the Supreme Court's analysis in *Widmar* in considering the third prong of the *Lemon* test — whether granting access to Student Venture will promote excessive entanglement with religion. "The usual setting for an entanglement clause violation is when a state official, in order to avoid giving state aid to religion, must make determinations as to what activity or material is religious in nature, and what is secular and therefore permissible." *Bender*, 741 F.2d at 555. A content-neutral access policy eliminates the need for these distinctions. As *Widmar* points out, prohibiting religious meetings may actually exacerbate entanglement. The Court's comments concerning the university setting are instructive:

> [t]he University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech." Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion. There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

*Widmar*, 454 U.S. at 272 n.11 (citations omitted). We find nothing in the facts of this case weighing against the application of *Widmar* on this issue and

thus conclude that there is no risk of excessive entanglement with religion in Centennial's applying a content-neutral approach to facilities access in the evening hours. The third prong of the *Lemon* test, then, is satisfied.

Having undertaken the strict scrutiny analysis required by the facts of this case, we conclude that Centennial's facility use policy excluding Student Venture from meeting and from renting school space is not narrowly drawn to achieve a compelling state interest. So long as Centennial maintains a limited student open forum to which outsiders may be invited, it expresses a judgment concerning its students' ability to distinguish neutral access from state sponsorship of the view expressed. Centennial cannot, therefore, rely on the impressionability of these same students as the basis for content-based exclusions from its facilities in the evening hours or as the basis for an establishment clause defense. Nor can Centennial reasonably argue that the Student Venture program is potentially divisive and inconsistent with the educational mission of the school where it would welcome the same program directed to the same audience in the afternoon setting.[14] We will, therefore, affirm the district court's grant of a permanent injunction in the appeal of Centennial School District.

VII.

The cross-appeal by Student Venture requires

14. While we have predicated our analysis on the finding of a designated open forum and have, consequently, applied strict scrutiny analysis to the facts before us, we are by no means convinced that the reasons advanced by Centennial for excluding Student Venture could withstand review even under a reasonable basis standard.

that we advance one step beyond where the district court stopped. In drawing a line between religious discussion and religious worship, concluding that discussion is within the parameters of the permanent injunction and worship without, we believe that the district court erred. As the majority in *Widmar* makes clear, both religious discussion and worship constitute speech protected by the first amendment. (Indeed, at oral argument, counsel for Centennial conceded that a distinction between religious speech and religious worship is untenable in an open forum and stated that Centennial did not stand on that distinction.) Both types of activity are permitted in the student open forum and we have been presented with no principled argument for excluding the same types of speech from school facilities in the evening. Attempting to draw a line between religious discussion and worship would only exacerbate establishment clause concerns, requiring Centennial to entangle itself in what would almost certainly be complex content-determinations. We believe that the neutrality interest of the school is best preserved where the government is content-neutral. Because the permanent injunction granted by the district court was too narrow in scope, we will remand this matter for entry of an injunction enlarged to conform to this opinion.

VIII.

Finally, we address Student Venture's contention that the district court erred in failing to consider Centennial's flat ban on distribution of religious literature:

> d. The sale or distribution of Bibles, testaments, scriptures or religious literature is prohibited.

We begin with the legal principle that the right of free speech encompasses the right to distribute literature. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981); *Gillette v. U.S.*, 401 U.S. 437, 462 (1971); *Martin v. Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105, 111-112 (1943).

Having noted the explicit creation of a student limited open forum in the afternoon, we recognize that, consistent with our analysis of the claims set forth above, any content-based restriction on speech in this forum must be shown to be narrowly drawn to achieve a compelling state interest. Centennial has asserted no compelling interest supporting its ban on distribution of religious material and, therefore, in the afternoon student forum, the ban is unconstitutional. This conclusion does not affect Centennial's right to "enforce regulations of time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry*, 460 U.S. at 45.

The argument advanced by Centennial in support of its ban on religious material in contexts outside the student open forum context hinges again on its argument that it maintains a closed forum and, in essence, may ban whatever it deems necessary for protection of impressionable children.[15] We recognize the difficult role assigned

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15. Despite the fact that a challenge to Centennial's ban on distribution of religious literature was included in Student Venture's Second Amended Complaint and was raised again at oral argument on the permanent injunction, the district court declined to resolve this issue on the merits. Centennial argues that a permanent injunction enjoining it from prohibiting distribution of religious literature will conflict with the Pennsylvania Court of Common Pleas' decision in *Polster*

to the school in achieving a balance between protecting its students and allowing them a measure of freedom necessary to intellectual development. While we can envision circumstances in which the school might have a compelling interest in shielding its students from indecent or inflammatory speech, we believe that, in the context of religious speech, Centennial's prior judgments concerning its students' maturity tip the balance away from the need for protection. We have concluded that Centennial has created an open forum in the William Tennent High School facilities and therefore cannot uphold the flat ban on all distribution of religious materials.

While Centennial has not raised an establishment clause defense in this context, we would, again through analogy to *Widmar*, find no violation of the *Lemon* three prong test.[16] With

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*v. Centennial Joint School Board*, 16 Bucks 492 (1967). In that case, the state court issued a permanent injunction enjoining Centennial from

> distributing or permitting to be distributed on any public school premises . . . copies of the Testament consisting of the King James Version of the New Testament and the Psalms and Proverbs of the Old Testament made for the Gideons . . . and furnished to [Centennial] free of charge by the Gideons International for distribution.

*Id.* at 504.

We think it clear that the *Polster* injunction was directed to distribution of bibles in a manner that implies school endorsement, i.e., through school channels during school hours. That situation is not presented here where only after-hours distribution through non-school channels is contemplated. We do not believe that Centennial's total ban on distribution of religious literature is mandated by *Polster*; indeed, *Polster* is inapplicable to the facts of this case.

16. For a discussion of distribution of religious material in a related context, *see*, *Thompson v. Waynesboro Area School Dist.*, *supra*, note 7.

respect to the distribution issue, then, we find that the permanent injunction issued by the district court was too narrow.

IX.

Having concluded that an open forum exists in the facilities of the William Tennent high school, we will affirm the district court's grant of a permanent injunction but will remand this matter in order that the district court may issue a revised injunction drafted, in conformity with this opinion, to include religious worship and distribution of religious materials.

STAPLETON, Circuit Judge, *Dissenting*:

I respectfully dissent. Based on *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985), this court should conclude that Centennial School District ("Centennial") has established a "nonpublic forum" rather than a "designated public forum," and that the lowered scrutiny prescribed for testing exclusions from such fora must therefore be applied. Applying this level of scrutiny, I am satisfied that Student Venture's exclusion from the school auditorium of the William Tennent High School is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 46 (1983). However, I believe Centennial's blanket prohibitions on religious worship and distribution of religious literature present issues that it is premature for us to address. Accordingly, I would reverse the judgment of the district court and

remand with instructions to address the bans on worship and distribution of religious literature, and to enter judgment for the defendants with regard to the remainder of the Centennial Facility Use Policy.

A.

When asked to enter a preliminary injunction, the district court found that Centennial, subject to limitations of hours, administrative requirements, and so forth, granted permission to anyone who wished to use school facilities. *Gregoire v. Centennial School District*, 674 F. Supp. 172, 177 (E.D.Pa. 1987). This factual finding was based on evidence showing the uses permitted in the past, not the rather sketchy written policy on facility use then in existence. As a result of its finding of indiscriminate permission to use school facilities, the district court properly concluded that Centennial could not exclude Student Venture from using the auditorium for Andre Kole's performance in the absence of a compelling state interest. *Id.* at 179-80. It then concluded that permitting Kole's performance would not result in an establishment clause violation and that Centennial, accordingly, had no compelling interest in avoiding such a violation. *Id.* at 177-78. A preliminary injunction issued and Kole's performance went forward.

On March 8, 1988, Centennial adopted new detailed regulations governing the use of school facilities. These regulations remained in effect nine months later when the district court entered its permanent injunction and issued a second opinion. In that opinion, the district court did not identify any instance after March 8, 1988 in which the new regulations were not followed and Student

Venture has referred us to no such instance during this appeal. While the district court was not satisfied that further constitutional violations would not occur, this concern was based on its view that the new regulations themselves violated the first amendment rights of Student Venture. In its words, "a reading of the new policy demonstrates that Centennial has, despite its declared intention, adopted as its new policy another open public forum, as that term has meaning in the constitutional sense." *Gregoire v. Centennial School District*, 701 F. Supp. 103, 106 (E.D.Pa. 1988). As a result of this conclusion and because nothing in the record suggests that Centennial has not followed its new written policy consistently and in good faith, the threshold issue before us, as I see it, is whether the new regulations create an open public forum by designation or a nonpublic forum. I conclude that they create a nonpublic forum.

B.

The first step in public forum analysis requires that we identify the relevant "forum." This is particularly important in this case because there are a number of different "fora" maintained in the same physical facilities. In the *Cornelius* case, the defendants contended that the relevant forum was the federal workplace, while the plaintiffs contended that it was the particular government program in which the plaintiff wished to participate, i.e., the Combined Federal Campaign (CFC), a charity drive aimed at federal employees. The Supreme Court held that the CFC was the relevant forum for first amendment analysis. *Cornelius* teaches that the forum "must be defined in terms of the access sought by the speaker" and

that "the particular channel of communications [the speaker desires to use] constitutes the forum." 473 U.S. at 800-801.

The existence of more than one forum at William Tennent High School is most readily seen by contrasting the forum to which Student Venture seeks access with a far more important forum from Centennial's point of view, the classroom forum created day in and day out in order to carry out the primary mission of the school. The purpose of this forum is to educate the student body with respect to the subjects covered by the school's curriculum. Accordingly, access to this forum is limited to students and faculty and to the school's curriculum. *See generally* Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw U.L. Rev. 1, 46-51 (1986) (discussing nature of school as forum). Student Venture does not seek access to this forum and concededly is not entitled to such access.

In addition to the regular daytime classroom forum, Centennial sponsors an Adult Evening School. As its name indicates, the purpose of this forum is to provide continuing education for adults from the school community. In addition to classes for foreign-born residents and other adults who wish to improve their basic English skills and prepare for the high school equivalency diploma exam, this program permits adult discussion groups to rent classroom space. In the words of the regulations, "[adults] seeking an 'open forum' for the free expression of ideas may make special arrangements to rent classroom space to teach such ideas in an objective manner through the Evening School Director."

The third forum that uses the school district

facilities is denominated by the regulations as the "limited open student forum:"

> A "limited open student forum" (meeting) may be requested by any secondary student or students enrolled in the Centennial School District who desire(s) to voluntarily initiate a meeting (to be held in an assigned area at no cost to the School District) in order to peacefully and with appropriate decorum discuss religious, political, philosophical or other topics which are not related to the curriculum, and wherein the School District or its employees will not be involved in any way in sponsorship of such meeting or discussion.

In recognition of the fact that students have and should have interests in matters beyond the school's curriculum, a forty-five minute afternoon period has been set aside so that any students who are so inclined may voluntarily gather to discuss extra-curricular topics among themselves. Religion is included as such a topic in response to the Equal Access Act, 20 U.S.C. § 4071, which prohibits any school that makes facilities available to noncurriculum related student groups from excluding any group "on the basis of the religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. § 4071(a). Contrary to the impression left by the court's opinion, the regulations provide that (1) such meetings may only be initiated by students, (2) the direction and control of the forum and content of the meetings must remain with the students, and (3) no outside group or person may have access to such a meeting without a written invitation from the students involved and "advance specific School Board approval which must be sought 30 days in

advance." Even when such permission is given, the outside group or person may not regularly attend such meetings and may not control or conduct such a meeting.

The regular daytime classroom program, the Adult Evening School program, and the limited open student forum are each separate programs created by Centennial with specific and distinct objectives. In addition to these programs, other groups are permitted to use school facilities *for the group's own purposes*, in some cases in return for the reimbursement of the direct cost to Centennial and in others upon the payment of a rental fee that exceeds those costs. It is this facilities rental program that is of primary relevance in this case. The groups permitted to participate in this program are specifically enumerated in the regulations. As reflected in the portion of the regulations reprinted in the appendix to this opinion, these groups fall into several categories. First, there are school affiliated organizations such as the parent-teacher associations, staff organizations, and booster organizations. Second, there are groups unaffiliated with the school whose members are residents of Centennial and who need space to pursue their own particular interests, e.g., "scouting organizations," "resident neighborhood associations organized for the purpose of discussion of neighborhood affairs," "resident music, artistic, and player associations," and "Resident Service organizations: Rotary, Kiwanis, Lions, Jr. Chamber of Commerce and like non-sectarian service organizations." Permitted groups must be open to "all otherwise qualified residents regardless of race, ethnic background, and/or religion." Groups in these first two categories are entitled to utilize the facilities in

return for reimbursement of Centennial's direct costs.

Three additional classifications of users are permitted access but only with advance payment of a significant rental fee:

> The following groups may make application for use of auditoriums, subject to the priorities of school use, with the understanding that established fees are above District cost and that *all* projected fees must be paid in advance:
>
> 1. Community based employee associations and labor unions (limited to members only) for meetings only.
>
> 2. Commercial profit making ventures which charge admission or sell tickets for the staging of plays and/or musical performances suitable for general audiences.
>
> 3. College/university course offerings/usage (classroom use *only*).

As we shall see, the existence of fora other than the one to which the plaintiffs seek access may be relevant to the analysis in a case of this kind. The existence and character of such fora, however, do not play the central role accorded them by the district court and this court's opinion.[1] The fact

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1. The court summarizes its holding, for example, as follows

> Centennial must be consistent in granting facilities access where it permits potentially divisive or conversion-oriente speech by outsiders to a student audience in schoo facilities in the afternoon, it cannot, on maturity grounds exclude the same type of speech directed to the sam audience from its facilities in the evening. Where i identifies student-directed conversion speech as it criterion for exclusion, it cannot reasonably allow som members of some groups to meet with each other an

that a speaker or a topic is recognized as appropriate for one forum does not mean that speaker or topic must be recognized as appropriate in another. Surely, the fact that religion is recognized as an appropriate topic for students to discuss in the "limited open student forum" or that transcendental meditation is taught to adults in the Adult Evening School does not mean that evangelical discourse must be permitted in the classroom or study hall.

C.

The district court's analysis and that of this court is based on the assumption that when a public entity permits an increasing number of different groups to use its facilities there comes a point at which it has created a public forum by dedication and can no longer exclude anyone absent a compelling state interest. As I read *Cornelius* and its progeny, however, a public entity is entitled to define the limits of any forum it creates so long as there is a basis for excluding the excluded speakers that is reasonable in light of the purpose of the forum and so long as it does not engage in viewpoint discrimination. Accordingly, so long as a school board makes its intent clear in written rules that are consistently followed, it may have a facilities policy, like that of this school district, that grants liberal access to school facilities and still excludes some potential users, without being required to articulate a compelling state interest mandating exclusion.[2]

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deny access to others whose speech does not implicate this conversion element.

Typescript at 27.

2. The majority's reliance on *Board of Education v. Mergens*, 58 U.S.L.W. 4720 (June 4, 1990) in this regard is misplaced.

In *Cornelius*, the Supreme Court made intent the touchstone for determining whether a government entity has created a "designated public forum," as opposed to a "non-public forum." It mentioned several kinds of evidence to which a court might look to ascertain the intent of the government, but the government's intent in creating the forum was the ultimate and determinative issue to be ascertained:

> The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with

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Typescript at 19-20, 27-28, 37-38. Writing for the majority, Justice O'Connor made it clear that Congress' "deliberate choice" to use the term "limited open forum" in the Equal Access Act rather than "limited public forum" "can only mean that it intended to establish a standard different from the one established by our free speech cases." 57 U.S.L.W. at 4724. Thus, the Supreme Court explicitly disavowed any implications of *Mergens* in the free speech context.

For example, the majority states that "[i]n light of the Supreme Court's decision in *Mergens* it is now clear that a secondary school may, by its acts, create a public forum implicating the same constitutional rules set forth in *Widmar*." Typescript at 28. While I do not disagree with the basic proposition asserted, it cannot be found in *Mergens*, which states "if Congress really intended to incorporate *Widmar* for reasons of administrative clarity, Congress kept its intent well hidden, both in the statute and in the debates preceding its passage." 57 U.S.L.W. at 4724 (brackets omitted, paraphrasing dissent).

> expressive activity to discern the government's intent. . . .
>
> . . . . We will not find that a public forum has been created in the face of clear evidence of a contrary intent.

407 U.S. at 802-803 (citations omitted).

In *Cornelius* the challenged executive order permitted participation in the CFC by voluntary, charitable, health and welfare agencies that provide services directly to individuals but specifically excluded agencies "that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves." The NAACP Legal Defense Fund was denied participation in the CFC based on this exclusion. The Supreme Court found that the government had created and maintained the CFC with the intent of providing selective access and concluded that "such selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum." 473 U.S. at 805. Accordingly, despite the fact that the NAACP was excluded on the basis of its core first amendment expressions, the Supreme Court declined to apply "compelling state interest" scrutiny. It prescribed a less stringent test when it summarized its holding:

> Control over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. . . .

474 U.S. at 806; *accord Perry*, 450 U.S. at 46.

This Circuit acted consistently with my understanding of *Cornelius* in *Student Coalition for Peace v. Lower Merion School Dist.*, 776 F.2d 431, 436-47 (3d Cir. 1985). After quoting the foregoing portion of *Cornelius*, we held that a school facility was not a designated public forum because the School Board did not grant permission to use the field in question "as a matter of course" but rather intentionally exercised discretion as to whether a non-school sponsored organization would be permitted to use the facility:

> We do not think that the evidence in this case shows an intent by appellees [i.e., School Board members] to create a public forum at Arnold Field. The Board's policy requires each nonschool sponsored organization, such as SCP, to obtain permission to use the Field. . . . We agree with the district court that SCP has not met its burden of showing that such permission was in fact granted as a matter of course. Thus, neither the written policy nor the actual practice of the appellees manifests an intent to designate Arnold Field as a public forum.

*Id.* at 436. Thus, the dispositive fact in *Student Coalition for Peace* was the absence of an affirmative intent on the part of the school board to open the athletic field to all comers. Similarly, the evidence in this case demonstrates that Centennial, after March 8, 1988, lacked any intent to open the auditorium or other school facilities to all comers. In the absence of any evidence of non-conforming conduct, the detailed regulations

adopted on that date alone are sufficient to establish that fact.[3]

After March 8, 1988, Centennial's position was quite similar to that of the City in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1979). There the City operated a rapid transit system and sold advertising space inside its cars. Its policy called for it to accept advertising from a wide variety of sources, e.g., "from cigarette companies, banks, savings and loan associations, liquor companies, retail and service establishments, churches and civil and public service oriented groups." *Id.* at 300. It refused, however, to accept a political advertisement submitted by the plaintiff. The

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3. The Supreme Court first identified three distinct types of fora – traditional public fora, designated public fora, and nonpublic fora – in *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37 (1983). *Perry* contains language suggesting that a forum can be intentionally dedicated by a public entity as a "limited public forum" and that speakers or topics within the ambit of the dedication cannot be excluded without showing a compelling state interest. 460 U.S. at 46 n.7. While I confess that I am unsure of the continuing vitality of the "limited public forum" concept after *Cornelius*, *see* Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1745-58 (1987) (arguing *Cornelius* "tactfully withdrew the concept of the limited public forum as a meaningful category of constitutional analysis"), I believe it has no application to the case before us. It may well be that if a governmental entity creates a forum dedicated to expressive activity by a particular class of speakers or to particular subject matter, strict strutiny of any exclusion of a member of the class or of a speaker seeking to address the stipulated subject matter is required unless and until the forum is redefined or terminated. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (university campus is open forum with regard to students only); *City of Madison Joint School District v. Wisconsin Public Employment Relations*

Supreme Court concluded that "a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles," 418 U.S. at 303, and that there had been no violation of the candidate's rights under the first amendment. *Lehman* has since been cited as a case involving a non-public forum. *E.g.*, *Cornelius*, 473 U.S. at 809; *Perry*, 460 US. at 49 n.9. The City's policy in *Lehman* permitted as many different types of speech as the school district has in this case; nevertheless, the court upheld the content-based exclusion on a finding that it was reasonable in the context of the forum created. *See also Perry*, 460 U.S. at 48 (finding nonpublic forum where access had been granted to "outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations.").

In short, based primarily on *Cornelius*, *Lehman*, and *Student Coalition for Peace*, I conclude that if a school district's policy is clear and consistent it

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*Comm'n*, 429 U.S. 167, 174-75 (1976) (school board meeting is public forum with regard to school business). But where, as here, there is an express definition of the forum at the time of its creation and the definition has been consistently applied, speakers or speech that does not come within the definition can be excluded so long as there is a rational basis for the exclusion in light of the purpose of forum and no viewpoint discrimination. *See Deeper Life Christian Fellowship v. Board of Educ.*, 852 F.2d 676, 679-80 (2d Cir. 1988) ("Under the limited public forum analysis, property remains a nonpublic forum as to all unspecified uses, and exclusion of uses — even if based upon subject matter or the speaker's identity — need only be reasonable and viewpoint neutral to pass constitutional muster." (Citations omitted)). In other words, a public entity can expressly limit the terms of the dedication without showing a compelling state interest for all excluded speakers and topics.

may prohibit religious speakers from a forum and welcome all other types of speakers without creating a public forum.

D.

Concluding that Student Venture seeks access to a nonpublic forum does not, of course, end the analysis. When a public entity defines a nonpublic forum as a part of its program, and is challenged by someone who is excluded by that definition, the exclusion can be sustained only if it is reasonable in light of the purpose served by the forum and does not discriminate on the basis of the viewpont of the speaker, as contrasted with the subject matter of his or her speech. Accordingly, I turn to a comparison of Student Venture with those groups who are permitted access to the relevant forum.

There is no difficulty in distinguishing the use of school district facilities by school affiliated organizations who, unlike Student Venture, share a common objective with Centennial, the success of the school program. In a somewhat similar vein, a common dedication to education supports Centennial's decision to allow use of school facilities for college or university course offerings. I also believe it clear that Centennial has a rational basis for distinguishing between the use of school facilities by Student Venture and their use by local special interest groups consisting of district residents whose families pay the tax bills that enable the school district to operate. While Student Venture has resident members, it is not an organization whose purpose is to serve the needs of residents of the school district. The same rational basis for distinguishing local special interest groups from Special Venture also justifies

the distinction between Student Venture and "community based employee associations and labor unions (limited to members only)."

More extended discussion is required with respect to the school district's inclusion of outside profit making ventures that stage plays and musicals for general audiences and its exclusion of Student Venture's Andre Kole production. Student Venture is candid in acknowledging that it seeks access to a general audience from the school community, which will include parents and children of all ages, in order to solicit their allegience to a particular religious view. I understand Centennial to advance two distinct justifications for its attempt to exclude such proselytizing religious speech from the school auditorium. First, there is an establishment clause-related concern for the possibility that young children will mistakenly perceive a message that the government, through the school, endorses the religious speech that is presented to a general audience in the school auditorium. Second, Centennial cites its desire to assure parents that school grounds will be kept free of the potentially divisive effect of outside groups urging an audience including young children to affiliate with a particular religion or subdivision thereof.[4]

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4. With regard to both these justifications it is important to realize that there is no reason to believe the audiences for religious functions on school property will be confined to secondary school students and adults. (In fact, the Centennial School District's Facility Use Policy covers facilities throughout the entire District, including elementary schools; the injunction ordered in this case will apply equally to all these facilities). For example, it is likely that public elementary school students were present during Andre Kole's performance. Even if parents are responsible for sending their

Centennial's concerns are very similar to the concerns held to justify the exclusion of the NAACP Defense Fund from the CPC in the *Cornelius* case. There the Supreme Court held that the government's desire to avoid the "appearance of favoritism" and to "avoid controversy" were sufficient to justify the exclusion from a non-public forum, even though "avoidance of controversy is not a valid ground for restricting speech in a public forum." 473 U.S. at 811. Of course, these concerns are far more compelling when public schools are involved. "In no activity of the State is it more vital to keep out divisive forces than in its schools." *Edwards v. Aguillard*, 107 S.Ct. 2573, 2578 (1987), (quoting *McCollum v. Board of Educ.*, 333 U.S. 203, 231 (Frankfurter, J., separate opinion).

I conclude that these same justifications are sufficient to support Centennial's policy in this case. It is not irrational for school board members to conclude that there would be a significant danger of communicating favoritism or endorsement if they permitted an outside religiously oriented organization access to a general audience from the school community for the purpose of soliciting converts. Nor is it irrational for school board members to conclude that permitting the auditorium to be used to attempt to convert members of a general audience from the school community to a particular

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children to such an event, it is quite plausible that the presence of a religious function in a building the impressionable child associates with the legitimate indoctrinating power of the state, *see Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979), will convey a strong message of official endorsement of religion.

religious viewpoint has a considerable potential for generating divisiveness.[5]

The court's opinion questions the sincerity of Centennial's justifications because the policy permits some religious speech and because it excludes some non-proselytizing religious speech. It is not clear to me that it is the place of the Court to question the sincerity of the rational basis tendered by a government defendant so long as it is not a pretext for viewpoint discrimination. When legislative and executive decisions are subjected to rational basis review, it is normally sufficient for the decisionmakers to identify a rational justification that they could have relied upon to support their decision. An historical fact inquiry into their subjective intent ordinarily is not required. *See United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *Flemming v. Nestor*, 363 U.S. 604, 612 (1960).

Moreover, I believe the court's logic is also flawed because it fails to acknowledge Centennial's reasons for treating the various fora differently. Participation in the Adult Evening School is by definition limited to adults, rather than to a general audience from the school community. This fact alone provides an explanation for Board's

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5. The court's opinion critiques Centennial's argument that it was concerned with proselytizing religious speech by noting that in Andre Kole's performance "[t]here was no altar call or overt commitment sought." Typescript at 23 n.6. A speaker need not distribute membership applications or perform baptisms in order to attempt to obtain new adherents to her views. In fact, the Complaint states that plaintiffs "all have evangelical Christian beliefs, including a sincere religious belief about evangelizing people, in order to convert them to believe in Jesus Christ as Lord and Savior." Second Amended Complaint ¶ 7.2.

position that is entirely consistent with its good faith. In addition, in the absence of evidence or fact finding to the contrary, I read the reference to "teach[ing] in an objective manner" with the approval of the Evening School Director to contemplate courses which approach religious subject matter in a pedagogical manner. This, combined with the fact that such study groups must be small (since only classroom space is made available) and self-initiated by the participating adults could lead a rational board member to conclude that religious subject matter in the Adult Evening School holds far less potential for divisiveness or an appearance of favoritism than permitting Andre Kole to perform in the auditorium.

Nor does the admission of religious subject matter to the afternoon student forum cast doubt upon Centennial's motive in excluding Kole from the auditorium. Here also the participants are limited to relatively mature individuals, i.e. secondary school students. Here also the groups must be small and initiated by the participants. Finally, because of the Equal Access Act, Centennial was confronted with the choice of having a forum for extracurricular discussion with religious subject matter or not having a forum for extracurricular discussion at all. Given this choice, a rational school board member could opt for creating such a forum with religious subject matter and still believe it was not in the district's best interests to permit auditorium performances by outside nonprofit organizations.

It is true, as the court's opinion stresses, that the regulations governing the facility rental program do not refer specifically to proselytizing. Nevertheless, I believe Centennial's justifications

support the distinction it has in fact drawn. The regulations permit music and theatrical productions staged by amateur groups consisting of school district residents and those staged by outside for profit organizations while they exclude such productions by outside nonprofit organizations. A rational school board could conclude that the likelihood of divisive speech or behavior that would give the appearance of favoritism on the school's part is substantially greater in the case of outside organizations whose activities are not motivated by profit than in the case of resident theatre groups or outside, for-profit productions. Outside nonprofit organizations seeking access to a general audience of strangers from the school community in most instances will either be proselytizing or soliciting financial support for their cause. While it is true that not all outside, nonprofit organizations would engage in activities of this kind if given permission to use the auditorium, the law does not require precise tailoring in this setting, only a rational basis for the distinction drawn; probabilities that favor the distinction are sufficient. I would further note that reliance on probabilities is particularly justified in a context like this where, as the court's opinion points out, there are substantial difficulties in drawing lines in advance in an attempt to isolate proselytizing conduct *per se*, and where exercising discretionary judgment on a case-by-case basis would endanger Centennial's desire to avoid any appearance of favoritism. *Cf. Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 575 (9th Cir. 1984) ("the more subjective the standard used, the more likely that the category will not meet the requirements of the First Amendment").

Finally, I turn to the issue of whether Centennial's regulations constitute, or are a pretext for, viewpoint discrimination. I do not understand the district court or this court to have found viewpoint discrimination. Moreover, I am not sure that Student Venture claims that Centennial is guilty of such discrimination. It does, however, stress that adult groups have been permitted to discuss yoga and transcendental meditation in the Evening School and that an outside for profit theatre group could presumably produce *Godspell* or *Jesus Christ Superstar* in the school auditorium. This emphasis occurs primarily in the context of an argument that the school facilities have been "opened up" to religious speech so that they are a public forum at least with respect to such speech, but there appears to be an additional implication that Student Venture's view of ultimate reality has been discriminated against.

When addressing any viewpoint discrimination issue, it is important to keep in mind the Supreme Court's distinction between subject matter discrimination and viewpoint discrimination. *Cornelius* makes clear that a public entity can exclude discourse on a particular topic from its forum so long as it has a rational basis for doing so. It may not, however, permit some viewpoints about a particular subject matter and exclude others without a compelling state interest. Accordingly, a school district may create a forum for a particular purpose and exclude all discourse in that forum concerning the nature of ultimate reality so long as it has a rational basis grounded in the purpose served by the forum. Absent a compelling state interest, however, it may not exclude the expression of one religious viewpoint while permitting others.

I perceive no evidence of viewpoint discrimination in this record. While this issue is one in which evidence about practices in other fora may be relevant, Centennial's policy with respect to the Adult Evening School does not reflect a bias against any particular religious viewpoint. Nothing in this record suggests that if a group of adult evangelical christians approached the Evening School Director asking for classroom space, it would not be able to discuss evangelical christianity in the same manner that others are permitted to discuss yoga or transcendental meditation. With respect to *Godspell* and *Jesus Christ Superstar*, the record similarly will not support a finding that Centennial favors the viewpoint reflected in those musicals over that exposed by Mr. Kole, assuming that there is a difference.[6]

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6. Displaying art or drama having a religious theme while excluding all religious speech that can be understood to urge affiliation with a particular religion has not been considered by the Supreme Court to be viewpoint discrimination. For example, in *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), the Court struck down the practice of beginning each day with readings from the Bible on the ground that the practice had a manifestly religious purpose, but at the same time explicitly endorsed study of the Bible in public schools either as a work of literature or in the course of an objective study of religion, and denied that such a distinction constitutes a bias against religion:

> It is insisted that unless these religious exercises are permitted a "religion of secularism" is established in the schools. We agree of course that the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe." We do not agree, however, that this decision in any sense has that effect. In addition, it might well be said that one's education is not complete without a study

Indeed, this record affirmatively shows that the drafters of Centennial's regulations went out of their way to assure that there would be a variety of religious discourse in the school community. Ironically, it was Centennial's willingness to accommodate a variety of religious expression in contexts where such expression would not pose significant problems for the School District and its mission, that caused it to lose its case in the district court and in this court.[7]

E.

In addition to the provisions discussed above, the Centennial Facility Use Policy contains two explicit restrictions:

> In any event, religious services (defined to include the invocation of, worship service to, prayer to, or adoration of a diety) is prohibited.

---

of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities.

*Id.* at 225. The Court in *Abington* thereby made the same type of distinction *within the general subject matter of religion* that is arguably presented in this case, and denied that such a distinction represented impermissible viewpoint discrimination. Furthermore, this same distinction is made in public schools every day, for example when *Paradise Lost* or *Pilgrims' Progress* — works with a manifestly religious message — are taught as works of literature in English classes.

7. Student Venture's equal protection claim does not merit a higher level of scrutiny than the scrutiny appropriate to exclusions from a nonpublic forum; since such an exclusion is not a burden on a fundamental right, the defendant need only articulate a rational basis for the distinction being made. *Perry*, 460 U.S. at 54.

*Appendix A*

> The sale or distribution of Bibles, testaments, scriptures or religious literature is prohibited.

Facility Use Policy II.C.1.d. & f. I think it likely that Centennial could articulate rational bases for enforcing both of these exclusions in the nonpublic facility rental program, although I am uncertain why it would be necessary to do so in light of the exclusion of nonprofit religious groups from this forum. However, because the Facility Use Policy does not expressly confine these restrictions to the nonpublic rental forum, these provisions raise a new set of concerns which have not yet been adequately addressed in these proceedings.

The exclusion of worship and literature distribution appears to apply to every fora created by the Policy, including the Adult Evening School and the limited open student forum. These provisions are located in a section of the Policy containing regulations governing facility use in all fora. Moreover, Centennial defends the ban on literature distribution as necessary to comply with the Pennsylvania Court of Common Pleas' injunction in *Polster v. Centennial Joint School Board*, 16 Bucks 492 (1967), which addressed distribution of Gideon Bibles during school hours, and therefore evidently intends the ban to apply to that forum. At least with regard to literature distribution, I read Student Venture to advance an overbreadth claim in addition to its primary contentions discussed above, arguing that the *Polster* injunction only justifies prohibiting distribution of literature in a manner connoting school endorsement: "If the *Polster* injunction is read to require a flat prohibition on any distribution of religious literature by anyone, then the *Polster* injunction unconstitutionally infringes

on the free speech, free press and free exercise of religion rights of students and outside groups who are properly using school facilities." Student Venture's Brief at 40.

I am uncertain whether Student Venture has standing to make such an overbreadth argument where the prohibitions under attack could validly be applied to the forum Student Venture seeks access to and where, if my analysis were adopted, Student Venture's claim to worship and distribute literature in that forum would be rendered moot by its valid exclusion from that forum. The current complaint does not allege that plaintiffs wish to engage in the prohibited activities in any of the other fora, although I note that two named plaintiffs are (or at least were) students at William Tennent High School, and there is evidence in the record that members of Student Venture, including one named plaintiff, have distributed religious literature during the school day. App. at 293-302. I would be reluctant to address a difficult standing issue when the complaint could easily be amended to avoid this problem.

If these overbreadth arguments are properly pressed in this proceeding, they raise a number of troubling issues which I shall only briefly mention. First, the question of whether students have a right to distribute religious literature on school grounds during the school day is a difficult and close one which this court has not yet resolved. *See Thompson v. Waynesboro Area School District*, 673 F. Supp. 1379 (M.D. Pa. 1987) (holding prohibition on distribution of religious literature unconstitutional); *see also Rivera v. East Otero School District R-1*, 721 F. Supp. 1189 (D. Colo. 1989) (same). Even if the school is considered an open forum for such purposes, *see* Laycock, *supra*,

at 48-49. Centennial would have an opportunity to demonstrate that prohibiting such distribution is necessary to a compelling interest. A letter from the principal of William Tennent High School suggests that Student Venture's activities during the school day have been disruptive. App. at 293. The Supreme Court has indicated that the decisions of school administrators in these matters must be accorded deference. *See, e.g., Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 271-73 (1988).

Next, it appears that the Equal Access Act contemplates allowing students to engage in prayer in the limited student open fora created thereunder. The statute itself provides that "[n]othing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof – (1) to influence the form or content of any prayer . . . ; (2) to require any person to participate in prayer . . . ." 20 U.S.C. § 4071(d). These caveats strongly imply that prayer is among the activities a school must allow if it has created a limited open forum under the Act. *See also Board of Education v. Mergens*, 58 U.S.L.W. 4270, 4272 (June 4, 1990) (upholding access by group formed "to read and discuss the Bible, the have fellowship, and to pray together."); S. Rep. No. 357, 98th Cong., 2d Sess. 39, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2349, 2385 ("Section 2(a) recognizes that the denial of permission for students to engage in voluntary extracurricular activities *that include prayer* or religious speech when a school permits students to meet for nonreligious extracurricular speech is discrimination against religious speech." (Emphasis added)). If this is so, then Centennial's blanket prohibition on worship - - if it does apply

to the limited student open forum – violates federal law at least when applied to the limited open student forum. Distribution of religious literature may well also be protected under the Act.

Finally, I note that even if the Adult Evening School were determined to be a nonpublic forum (an analysis I will not attempt in this opinion), Centennial would still be required to articulate a rational basis for excluding distribution of religious literature from that forum – again, if the prohibition applies to that forum. Since such a distribution might be necessary and appropriate to objective discussions of religious subject matter, I think it would be difficult to defend the prohibition in this context.

In short, the blanket prohibitions on worship and distribution of religious literature raise a number of questions of law and fact, wholly unaddressed by the district court and largely unaddressed by the parties, that it would be imprudent for this court to address at this point. I would leave these issues to be explored further on remand.

F.

The result reached by the court today is extremely unfortunate. School facilities are community assets; their utility should be maximized. Liberal facility use policies like that of this school district should, therefore, be encouraged. At the same time, we must be realistic enough to acknowledge that proselytizing a general audience from the school coummunity including parents and young children can have a disruptive effect on the school community and can convey to some an unintended message of partiality on the

part of the school district. School board members who have legitimate concerns about such matters should not have to choose between admitting Student Venture to the auditorium and either cutting back dramatically on the number of groups granted access or prohibiting religious discussions among students in the afternoon open forum or among adults in the evening program. Either course would exact a high and, in my view, unnecessary price.

## *APPENDIX*

*Excerpts From Centennial School District Facility Use Policy*

I. *General Provisions*

A. *Users Exempt From Fees*

The following, listed in priority order, may apply to use the listed facilities for their regular meetings and related special activities for only the fees specified in Section VII.A., provided the use does not conflict with uses of higher priority, or interfere with public school programs or activities; and further provided that admission charges, donations or other considerations are not to be collected, requested or solicited.

- Custodial charges will be assessed to these groups when it is necessary to bring in custodians during non-working hours *or* to add to custodial staff due to the nature of the activity (special set-up, cleaning, etc.).
- Where a user desires to put on a special event and accept donations, the additional charges specified in Section III.A.5. shall apply.

*Appendix A*

| *Groups* | Applicable *Facility* |
|---|---|
| 1. Home and school and/or parent/teacher associations | All Facilities |
| 2. Centennial resident youth groups<br>a. organized sports<br>b. scouting organizations<br>c. Indian Guides/Princesses<br>d. organized cheerleaders | Classrooms/ Gymnasiums Grounds |
| 3. Centennial booster organizations (school affiliated) | All Facilities |
| 4. Centennial resident civic, cultural and service organizations having a majority of Centennial resident membership and/or an on-going connection with the Centennial community. | All Facilities |
| a. Civic: Centennial resident neighborhood associations organized for the purpose of discussion of neighborhood affairs | |
| b. Cultural: Centennial resident music, artistic, play associations organized for the purpose of rehearsing, performance of music compositions plays or arts displays | |
| c. Centennial Resident Service Organizations: Rotary, Kiwanis, Lions, Jr. Chamber of Commerce and like non-sectarian service organizations. | |

*Appendix A*

| | |
|---|---|
| 5. Centennial resident adult recreational groups having a majority of Centennial resident membership and/or an on-going connection with the Centennial community. | Gymnasiums/ Grounds |
| 6. Centennial staff groups (limited to staff attended functions only). | All Facilities |

*Note*: All groups listed above must be open to all otherwise qualified residents regardless of race, ethnic background and/or religion.

B. *Evening School*

The Evening School shall function as an activity wherein the basic emphasis shall be upon (1) Adult Basic Education (A.B.E.), for foreign-born residents and other adults who wish to improve their basic English skills and to prepare to the G.E.D., and (2) for the High School Equivalency Diploma (G.E.D.). General classes shall be as scheduled, upon a showing of interest sufficient to justify the expense. Persons or groups seeking an "open forum" for free expression of ideas may make special arrangements to rent classroom space (see VII.A) to teach such ideas in an objective manner through the Evening School Director. Arrangements must be made three months in advance of the projected course start-up date.

C. *Users Subject to Fees* (See VII.A)

The following groups may make application for use of auditoriums, subject to the priorities of school use, with the understanding that established fees are above District cost and the *all* projected fees must be paid in advance:

*Appendix A*

1. Community based employee associations and labor unions (limited to members only) for meetings only.
2. Commercial profit making ventures which charge admission or sell tickets for the staging of plays and/or musical performances suitable for general audiences.
3. College/university course offerings/usage (classroom use *only*).

. . . .

V. *Limited Open Student Forum* (Title VIII § 801-3)

A. Student Participation

A "limited open student forum" (meeting) may be requested by any secondary student or students enrolled in the Centennial School District who desire(s) to voluntarily initiate a meeting (to be held in an assigned area at no cost to the School District) in order to peacefully and with appropriate decorum discuss religious, political, philosophical or other topics which are not related to the curriculum, and wherein the School District or its employees will not be involved in any way in sponsorship of such meeting or discussion.

1. Space for such a meeting shall be requested of the building principal twenty school days in advance.
2. Requests may be granted only on days that school is actually open for students during the 180-day school year, and staff and space are available on a first-come basis exclusively during non-instructional time.
   a. High School - between 2:15 and 3:00 p.m.
   b. Junior High Schools - between 2:45 and 3:30 p.m.

3. The principal may assign a school employee to maintain decorum, order and discipline, to protect students, faculty and property, and to determine that student attendance is indeed voluntary. This monitoring activity is not to be construed as School District sponsorship.
4. During working hours school employees are prohibited from either promoting, leading or participating in such meeting(s) or requiring any student to participate in any such meeting(s).

. . .

B. Non-School Person or Non-School Group Participation in the Limited Student Forum

1. No non-school person or non-school group shall be admitted to any limited open student forum without the written invitation and consent of the student or students initiating the meeting and advance specific School Board approval. A request for Board approval shall be filed with the principal thirty calendar days in advance of the projected meeting date stating the name, address and affiliation of the non-school persons or non-school groups desiring to be present.
2. Any non-school person or non-school group seeking to participate in any way in the open student forum shall provide the required certificate of insurance under § 6.A.3.
3. In any event, non-school person(s) or non-school group(s) are prohibited from controlling, conducting or regularly attending any and all limited student open forum(s), and the School District reserves the right to limit or to revoke any privilege granted to such

**person(s) or group(s) or to exclude such person(s) or group(s) entirely.**

4. **Policy 5.8, "Utilization of Outside Speakers in the Instructional Program", shall not apply to requests under this policy.**

C. **Should Title VIII § 801-3 [the Equal Access Act] be declared by a court of competent jurisdiction to be invalid or unconstitutional, this Policy Section shall be null and void.**

A True Copy:
Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

## APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 87-6679

GREG GREGOIRE, DAVID URBANY, SCOTT IRWIN and HERMAN DIETSCH,

v.

CENTENNIAL SCHOOL DISTRICT, and RONALD Y. WHITE, in his official capacity as Supervisor of Secondary Education for the Centennial School District.

MEMORANDUM ORDER

AND NOW, TO WIT, this 25th day of July, 1989, presently before the court is plaintiff's motion for clarification pursuant to Fed.R.Civ.P. 59(e)[1] of the Court's Memorandum and Order entered November 30, 1988. Plaintiffs ask the court to address two legal issues: 1) whether the school district's Facility Use Policy (page 6.2.F.) which prohibits the sale or distribution of Bibles, testaments, scriptures or religious literature is unconstitutional and how it meshes with a permanent injunction issued against

1. Plaintiffs assert Fed.R.Civ.P. 59(e) as their basis for the motion for clarification. Rule 59(e) provides for motions to alter or amend a judgment and does not address a litigant's attempt to have the court expand or expound upon a prior decision.

the school district in 1967 by a state court in *Polster v. Centennial Joint School Board,* 16 Bucks 492 (1967) and 2) whether the court's opinion allows the school district to ban churches from its open forum, if a church wanted to rent the school auditorium for a church service.

Plaintiffs did not pursue this first issue during the proceedings before the court. Plaintiffs submit, and the school district agrees, that many occasions could arise wherein a conflict between the permanent injunction in this case, which states that as along as defendants maintain an open speech forum they are permanently enjoined from refusing to allow groups or individuals to use those facilities solely because of the religious content of their speech, absent some compelling state interest, and the *Polster* injunction which enjoins defendants from "distributing or permitting to be distributed on any of its constituent school districts, copies of the Testament consisting of the King James Version of the New Testament and the Psalms and Proverbs of the Old Testament." 16 Bucks at 504. The court is not going to issue an advisory opinion on this apparent schism especially when the plaintiffs could have pursued it in the initial stages of the litigation.

The court's preliminary injunction was issued in accordance with the circumstances and evidence submitted to the court in the preliminary injunction hearing and subsequent filings in support and in opposition to plaintiffs' motion for summary judgment. The scope of the injunction was circumscribed by the degree to which defendants, through their regulations, maintained an open forum, *see Gregoire v. Centennial Sch. Dist.*, 674 F. Supp. 172, 179 (E.D.Pa. 1987), *aff'd, Appeal of Centennial Sch. Dist.*, 853 F.2d 917 (3d Cir. 1988) and *Gregoire v. Centennial Sch. Dist.*, 853 F.2d 918 (3d Cir. 1988), and the court will not prognosticate

as to other factual scenarios that were not before the court at the time of its ruling.

Accordingly, plaintiff's motion for clarification is *denied.*

s/ Louis C. Bechtle
LOUIS C. BECHTLE, J.

Filed: July 25, 1989

Entered: July 26, 1989

Supreme Court, U.S.
FILED
SEP 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-304

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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CENTENNIAL SCHOOL DISTRICT and RONALD Y. WHITE, in his official capacity as Supervisor of Secondary Education for the Centennial School District,

*Petitioners,*

v.

HARRY GREGOIRE; DAVID URBANY; SCOTT IRWIN; HERMAN DIETSCH; RICH MILLER; and CAMPUS CRUSADE FOR CHRIST, INC.,

*Respondents.*

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## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

Does a school district that generally opens its facilities to outside groups after school hours but prohibits access to religious groups because of the content of their speech violate the First Amendment?

Do public school districts have unlimited power to create any arbitrary limitations on group access to limited open forums?

May a school district ban all distribution of any religious literature in a public school, even during non-school hours by people attending permitted meetings by outside groups?

Does the Constitution, which requires "religious speech" in open forums, also require public schools to ban "religious worship" from its open forums?

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IN THE

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OCTOBER TERM, 1990

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### STATEMENT OF THE CASE

The Third Circuit correctly found that the Centennial School District (hereinafter, "Centennial") unconstitutionally excluded religious groups from Centennial's open forum for community groups. The Third Circuit also declared unconstitutional Centennial's blanket ban on any distribution of religious literature (only) at any time at Centennial school buildings, even during open forum times.

Centennial School District has a specific policy that opens its facilities to community groups for expressive activities. Harry Gregoire, the suburban Philadelphia director of Student Venture, sought to rent the high school auditorium in the Centennial School District for a Saturday night performance by Andre Kole, an illusionist/evangelist from Campus Crusade for Christ. Student Venture is the high school wing of Campus Crusade for Christ, a conservative evangelical Christian organization. Centennial refused to rent a high school auditorium to Student Venture because of the religious content at the end of the illusionist performance.

At the time this controversy arose in October, 1987, Centennial had an official policy on "Facility Use" which encouraged the use of the facilities by resident students and community groups, but expressly forbade use of school facilities for religious purposes. Section B.17 of the Facilities Use Policy read:

> Pennsylvania law specifically prohibits the use of school facilities for religious services, instruction and/or activities.

Student Venture brought an action in the U.S. District Court for the Eastern District of Pennsylvania under 42 U.S.C. § 1983 for injunctive and declaratory relief against Centennial School District and Ronald Y. White, Supervisor of Secondary Education for Centennial. The court granted Student Venture's motion and issued a preliminary injunction. 674 F.Supp. 172 (E.D.Pa. 1987). Centennial appealed the preliminary injunction to the United States Court of Appeals for the Third Circuit and the court, without opinion, upheld the preliminary injunction. 853 F.2d 917, 918 (3rd Cir. 1988).

**Centennial's New Policy and Continued Open Forum**

After the District Court granted Student Venture's preliminary injunction, and before the Third Circuit affirmed the decision, Centennial changed its Facility Use policy, but the changes were merely cosmetic. Centennial's new policy still

creates an open forum by permitting all types of groups to use the facilities[1] while continuing to place content-based prohibitions on religious speech in violation of the Constitution.

The new policy, like the old policy, expressly contains content-based exclusions against religious speech. Oddly enough, Centennial goes even further in the new policy to preclude religious speech by adding new exclusions prohibiting the use of the facilities for religious services and prohibiting the distribution of all religious literature in its facilities at any time. The new policy states, in pertinent part:[2]

> c. In any event, religious services (defined to include the invocation of, worship to, prayer to, or adoration of a diety [sic]) is prohibited.
>
> d. The sale or distribution of Bibles, testaments, scriptures or religious literature is prohibited.

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[1] Centennial allows various groups to use its facilities including (cert pet. at 5-6):

> Centennial resident civic, cultural and service organizations having a majority of Centennial resident membership and/or an on-going connection with the Centennial community.
>
> a. Civic: Centennial neighborhood associations organized for the purpose of discussion of neighborhood affairs.
>
> b. Cultural: Centennial resident music, artistic, player associations organized for the purpose of rehearsal, performance of music compositions, plays or art displays.
>
> c. Centennial Resident Service Organizations: Rotary, Kiwanis, Lions, Jr. Chamber of Commerce and like nonsectarian service organizations.

The new policy also permits school facilities to be used by:

1. Community based employee associations and labor unions (limited to members only) for meetings only.

2. Commercial profit making ventures which charge admission or sell tickets for the staging of plays and/or musical performances suitable for general audiences.

[2] Cert. pet. at 6.

The District Court granted Student Venture's motion to amend its complaint to challenge the new policy under the facial overbreadth doctrine and on November 30, 1988, the District Court issued a permanent injunction, ruling that the new policy still created an open forum, with content-based exclusions of religious speech. 701 F.Supp. 103 (E.D.Pa. 1988).

On June 22, 1990, United States Court of Appeals for the Third Circuit affirmed the District Court's grant of a permanent injunction against Centennial. Further, the Third Circuit agreed that Centennial's policy unconstitutionally banned "religious worship" from its open forum, and unconstitutionally prohibited any distribution of religious literature. The Third Circuit instructed the District Court to issue a revised, expanded injunction against Centennial's ban on religious worship in the open forum and the prohibition on distribution of religious materials. 907 F.2d 1366 (3rd Cir. 1990). Centennial School District has appealed that decision of the Third Circuit to this Court.

## REASONS FOR DENYING THE WRIT

### I. THE COURT OF APPEALS CORRECTLY APPLIED SUPREME COURT "OPEN FORUM" PRECEDENT

This Court should deny cert in this case because the Third Circuit correctly followed the principles of open forum law expressed by this Court in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), and *Board of Education of the Westside Community Schools* v. *Mergens*, 495 U.S. ____, 110 L.Ed.2d 191 (1990). The Third Circuit correctly ruled that Centennial maintains an open forum by policy, and properly rejected Centennial's content-based exclusions against religious speech.

This case is governed by and progresses naturally from this Court's decisions in *Widmar* and *Mergens*. In *Mergens* this Court held that a public high school which allowed non-curriculum related student groups to use the facilities must also allow

religious student groups to use the facilities.[3] In *Widmar*, this Court found that a state university which generally allowed student groups to use its facilities could not constitutionally ban student religious groups from meeting on campus. The present case deals with a public high school which generally allows outside groups to use its facilities during non-school hours yet prohibits religious groups from using the facilities during non-school hours solely because of the content of their speech.

Centennial engages in content-based discrimination against religious speech under its policy. The school district attempts to hide that fact by claiming its schools are not open to the "general public," but are only open for specifically designated "groups" and "activities." As the Third Circuit correctly said, the policy language attempts to "gerrymander" the open forum to exclude religious groups, *see Gregoire* v. *Centennial School District*, 907 F.2d ____, (3rd Cir. 1990) (cert. pet. at 19a), but the terminology does not alter the constitutional reality, and the gerrymandering is not disguised.

### A. Centennial Has Created An Open Forum.

Centennial's policy explicitly opens its public property for use by outside groups, which is the main hallmark of a government-created open forum. In *Perry Education Association* v. *Perry Local Educator's Association*, 460 U.S. 37 (1983), this Court said an open forum is one "generally open to the public, even if it were not required to create the forum in the first place." *Id.* at 45.

Also, this Court has clearly ruled that public schools can be open forums, and are subject to the constitutional principles spelled out in *Perry* and *Widmar*. In *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), this Court said:

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[3] While this case does not deal with the Equal Access Act, this Court's analysis in *Mergens* is analogous and helpful in this context.

> Hence, school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities for "indiscriminate use by the general public," *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 47 (1983), or by some segment of the public, such as student organizations. *Id.* at 46, n.7 (citing *Widmar* v. *Vincent*).

484 U.S. at 267. There is nothing inherent about public schools that exempts them from the rigors of the First Amendment, and allows public schools to engage in content-based exclusions against religious speech from their open forums.

The Centennial policy allows the following broad range of outside groups to use school facilities:

> Centennial resident civic, cultural and service organizations having a majority of Centennial resident membership and/or an on-going connection with the Centennial community.
>
> a. Civic: Centennial neighborhood associations organized for the purpose of discussion of neighborhood affairs.
>
> b. Cultural: Centennial resident music, artistic, player associations organized for the purpose of rehearsal, performance of music compositions, plays or art displays.
>
> c. Centennial Resident Service Organizations: Rotary, Kiwanis, Lions, Jr. Chamber of Commerce and like non-sectarian service organizations.

Cert. pet. at 5-6.

The policy also permits school facilities to be used by "community based employee associations and labor unions (limited to members only) for meetings only" and "commercial profit making ventures which charge admission or sell tickets for the staging of plays and/or musical performances suitable for general audiences." *Id.*

Centennial guarantees these groups free expression while they are using Centennial facilities. Centennial promises, "free

expression within the limits of the specific groups and activities authorized." Also, Centennial guarantees freedom of expression in its adult education classes. Centennial says that "the use of assigned *classroom* space within the Evening School is intended to reasonably accommodate 'open forum' requests."

After evaluating this policy, the Third Circuit correctly found that Centennial created a designated open forum and engaged in content based discrimination.

> While it disavows an intent to create an open forum Centennial has, in reality, opened its doors to those groups substantially outside what is commonly thought of as the educational mission of the school and has gerrymandered Student Venture out of Centennial facilities solely on the basis of the religious content of its program.

*Gregoire*, 907 F.2d at ____, (cert. pet. at 19a).

### B. Centennial Bans Religious Speech From Its Open Forum.

Amidst all this free expression, Centennial slams the door on all religious speech. In addition to the policy sections which expressly prohibit use of the facilities for religious services, (§ II.C.1.c.),[4] and the "sale or distribution of Bibles, testaments, scriptures or religious literature," (§ II.C.1.d.),[5] Centennial catches all other religiouis groups which might otherwise qualify under the policy, in two other sections.

In § I.A.4., Centennial allows civic, cultural and service groups to use the school facilities at no cost. Yet Centennial requires that the service groups must be "*non-sectarian.*"[6]

The policy also covertly guarantees that Student Venture could never again have a performance by Andre Kole in the Centennial open forum. Under § I.C. which lists the groups

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[4] Cert. Pet. at 6.

[5] *Id.*

[6] *Id.*

which will be charged for the use of the facilities, Centennial allows "commercial *profit making ventures* which charge admission or sell tickets for the staging of plays and/or musical performances suitable for general audiences."[7] Religious groups, most if not all being non-profit, are thereby precluded from using Centennial facilities at any cost.

Centennial's disingenuous gerrymandering of the forum effectively cuts out religious groups and only religious groups from using its facilities, and as this Court has said, "[w]here the State has opened a forum for direct citizen involvement, exclusions bear a heavy burden of justification," *Widmar* v. *Vincent*, 454 U.S. at 268.

### C. The Court Of Appeals' "Limited Forum" Analysis Is Correct.

Centennial attempts to avoid the constitutional principles governing open forums, by defining itself as a "limited open forum," but distorting the "limited open forum" concept so that it retains total power to exclude groups based on their content. Essentially, Centennial argues that any content-based "limitation" it chooses to impose is constitutionally permitted, because Centennial operates a "limited open forum." Centennial masquerades its content-based exclusions as legitimate "limitations" for a "limited open forum," and goes far beyond what this Court has said about limited open forums.

The Third Circuit swiftly rejected Centennial's misuse of the "limited open forum" doctrine, and exposed the inherent bias in the school district's argument that it operates a limited open forum:

> The definition of groups falling within the "educational mission of the school" is so vague that Centennial has virtually unlimited discretion in deciding which groups qualify and which do not. The term "civic" can be stretched or contracted to fit whatever the school district decides.

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[7] *Id.*

*Gregoire*, 907 F.2d at ____ (cert. pet. at 18a). As the Third Circuit points out, Centennial has already inconsistently applied its forum "limitations" so that they function as content-based exclusions.

> While it stresses the need for religious and political neutrality, Centennial has opened its evening program to religious discussion and has granted access to politically active groups, such as neighborhood association, labor unions and civic organizations such as the Rotary. Centennial has also opened its doors to dramatic and musical performances by commercial profitmaking ventures. These performances are not required to relate to school or civic purposes. Civic organizations, which have taken stands on politically divisive issues, are also permitted to meet at the high school.

*Id.*

This Court recognized the same problem in *Mergens* where the school district argued that it had the power to determine what was "curriculum related" thereby controlling the application of the Equal Access Act.

> Allowing such a broad interpretation of "curriculum-related" would make the [Act] meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content.

*Mergens*, 495 U.S. at ____, 110 L.Ed.2d at 212.

To allow Centennial to determine what is and what is not within the "educational mission of the school" would be untenable. Unlike the university and school district in *Widmar* and *Mergens* which argued that they were compelled by the Establishment Clause to preclude facilities use by religious groups, Centennial simply does not want religious speech in its facilities.

Centennial's idea of a limited forum is chilling in light of the history of the First Amendment and this Court's interpretation of the Free Speech Clause. It is especially chilling in light of the School District's stated desire that its schools are to be "an island of pluralistic tolerance and neutrality."[8]

Rather than submit to First Amendment requirements for open forums, Centennial threatens to shut its doors in order to avoid allowing religious and political groups access to school facilities after hours:

> Certainly every school district in the country need not close its auditoriums, athletic fields, classrooms, cafeterias, and other facilities to the Cub Scouts, Brownies, Kiwanis, Lions and local adult education groups, in order to avoid opening itself up to a first-come-first-serve open forum policy in which fractious political and religious speech of every kind must be permitted.

Cert. pet. at 27.[9]

Centennial's puzzling policy of tolerance by intolerance and neutrality by discrimination is an affront to the First Amendment. Centennial wants free speech, but does not want anything it deems as "fractious" speech. But controversy and debate flow from free speech. As this Court has said:

> [A] function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocation and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance.

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[8] Cert. pet. at 16.

[9] There has been no evidence that the Andre Kole performance was in any way "fractious." The performance occurred on the evening of October 31, 1987. It was attended by about 300 community members, students and others. Kole gave an evangelism message at the end of the performance. There was no disruption or harm to school property.

*Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949). Allowing Centennial to define a limited forum by the content of the speech rather than other legitimate means, violates the Free Speech Clause and condones an unacceptable message of intolerance.

### D. Religious Worship Is Protected Speech Under The First Amendment.

In the District Court's two opinions granting the preliminary injunction and later, the permanent injunction, the District Court drew a strange distinction that "religious speech" is permitted in an open forum, but not "religious worship." 674 F.Supp. at 179; 701 F.Supp. at 107.

Centennial used this erroneous distinction of law when it drafted its new policy (after the preliminary injunction had been handed down, but before the ruling on the permanent injunction). Centennial prohibits religious services, including religious worship, under its facility use policy.

> c. In any event, religious services (defined to include the invocation of, worship service to, prayer to, or adoration of a diety [sic]) is prohibited.

Cert. pet. at 6.

After the District Court issued the permanent injunction, it again stated that "religious speech" must be allowed in an open forum, but that the Constitution required "religious worship" to be banned from an open forum. Student Venture cross-appealed this point of law, saying that the Constitution does not draw any difference between "religious speech" and "religious worship" for open forum purposes. Student Venture referred to this Court's pronouncements in *Widmar* that religious worship was fully protected under the Free Speech Clause in an open forum setting. 454 U.S. at 269, n.6.

The Third Circuit agreed, and struck down Centennial's specific ban on religious worship in the open forum. The Third Circuit, citing *Widmar*, correctly held that "religious discussion and religious worship constitute speech protected by the

first amendment." *Gregoire*, 907 F.2d at ____, (cert. pet. at 36a).

The Third Circuit correctly applied the principles that this Court's held in *Widmar*. *Widmar* reaffirmed what this Court had said in earlier cases, that the Free Speech Clause protects both religious speech and religious worship. *See, e.g., Fowler* v. *Rhode Island*, 345 U.S. 67 (1953) and *Niemotko* v. *Maryland*, 340 U.S. 268 (1951).

The Third Circuit was correct in holding that the District Court's injunction was too narrow and appropriately instructed the court to revise the injunction to prohibit Centennial from banning religious worship in its open forum.

### E. Centennial's Complete Ban On The Distribution Of All Religious Literature Is Unconstitutional.

The Third Circuit also instructed the District Court to revise its injunction to prohibit Centennial's complete ban on the distribution of all religious literature. Centennial's policy states that:

> d. The sale or distribution of Bibles, testaments, scriptures or religious literature is prohibited.

Cert. pet. at 6.

The Third Circuit noted that "the right of free speech encompasses the right to distribute literature."[10] The Third Circuit correctly ordered the District Court to expand the permanent injunction to include the ban on distribution of religious literature in the injunction.

The total ban on the distribution of religious literature swept too far, and eliminated constitutionally-protected literature in

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[10] Cert. pet. at 37a (quoting *Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981); *Gillette* v. *U.S.*, 401 U.S. 437, 462 (1971); *Martin* v. *Struthers*, 319 U.S. 141 (1943); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 111-12 (1943)).

its parameters. For example, people attending an open forum meeting at the high school after school hours could not distribute religious literature to others at the meeting, directly contradicting what this Court has said in such cases as *Marsh* v. *Alabama*, 326 U.S. 501 (1946).

If the Third Circuit had affirmed the District Court's injunction without adding the ban on literature distribution, then it would have produced an inconsistent result. Centennial's policy would have permitted people to talk about religion in the Centennial open forum (under the *Gregoire* injunction), but they could not distribute any literature about religion at those same meetings.

Also, the policy could be read to mean that a student could not hand a religious booklet to a friend in the public school. This would violate the students' free speech rights.[11] Such situations make that portion of the policy unconstitutional and the Third Circuit was correct in including the ban on distribution in its order.

## II. THE LOWER COURTS ARE CORRECTLY APPLYING THE CURRENT SUPREME COURT PRECEDENT

Centennial, in its cert petition, makes it appear that the Third Circuit wrote an aberrant decision out of step with the other federal circuits and district courts. In reality, the Third Circuit's opinion reflects the new trend set by this Court in *Mergens* and *Widmar*, which is also being followed by other lower courts.

### A. Lower Courts Are Following This Court's Precedent In *Widmar* v. *Vincent* And *Board Of Education* v. *Mergens*.

In recent years, the current trend among the lower courts has been to hold that public school facilities can become open

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[11] *See Thompson* v. *Waynesboro Area School District*, 673 F.Supp. 1379 (M.D.Pa. 1987) *affirmed by an equally divided court*, (No. 88-5235, 3rd Cir., May 31, 1989) and *Rivera* v. *East Otero School District R-1*, 721 F.Supp. 1189 (D.Colo. 1989).

public forums even for religious speech. The lower courts have applied the principles of *Widmar*, *Mergens* and *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), where this Court found that high school facilities can be public forums. *Id.* at 267. Public schools, simply because they are public schools, are not exempt from the Constitution's prohibition against content-based exclusions from an open forum.[12]

Many lower courts have ruled that public school open forums cannot exclude religious groups. Along with the Third Circuit in *Gregoire*, the Eighth Circuit in *Mergens* v. *Board of Education*, 867 F.2d 1076 (8th Cir. 1989) said that the First Amendment required a public school to allow a religious group to meet in the school's open forum. This Court reviewed and upheld the Eighth Circuit's decision in *Mergens*. Although this Court did not reach the Free Speech Clause grounds addressed by the Eighth Circuit in *Mergens*, this Court did not rule that the Eighth Circuit was wrong in saying that the First Amendment open forum principles applied in *Mergens*.[13]

The Second Circuit has also ruled that a public school cannot ban a church from meeting in its open forum in *Deeper Life Christian Fellowship, Inc.* v. *Board of Education*, 852 F.2d 676 (2nd Cir. 1988). Although the Second Circuit used reasoning at odds with this Court's pronouncements in *Widmar* and *Mer-*

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[12] *See also Knights of the Ku Klux Klan, Realm of Louisiana* v. *East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978); *National Socialist White People's Party* v. *Ringers*, 473 F.2d 1010 (4th Cir. 1973); *Clergy and Laity Concerned* v. *Chicago Board of Education*, 586 F.Supp. 1408 (N.D.Ill. 1984); and *Lawrence University Bicentennial Commission* v. *City of Appleton*, 409 F.Supp. 1319 (E.D.Wis. 1976).

[13] Also, the Fifth Circuit has ruled that under the principles of *Widmar*, a womens' prayer group cannot be excluded from an open forum at a public library. *Concerned Women for America* v. *Lafayette County and Oxford Public Library*, 883 F.2d 32 (5th Cir. 1989). The D.C. Circuit ruled that it did not violate the Establishment Clause for Pope John Paul II to conduct a Catholic Mass on the Capitol Mall in Washington, D.C. *O'Hair* v. *Andrus*, 613 F.2d 931 (D.C.Cir. 1979).

*gens*, it did rule that a public school must allow a church to meet on school grounds.

In early July, 1990, the U.S. District Court for the Northern District of New York held that the Owego-Apalachin Central School District was an "open forum" for a Youth for Christ illusionist-evangelist who performs an act very similar to the one performed by Student Venture in the Centennial School District. That district court ruled that it violated both *Widmar* and *Mergens* for the public school to deny permission to the illusionist-evangelist to use the school's open forum. *See Toby Travis* v. *Owego-Apalachin School District*, (1990 WL 94196). This case currently is on appeal to the Second Circuit.

In *Country Hills Christian Church* v. *Unified School District 512*, 560 F.Supp. 1207, 1215 (D.Kan. 1983), that federal district court ruled that *Widmar* required a public school to allow a church to use its open forum. The court there rejected the notion that the open forum doctrine does not apply to public schools.

In *Bender* v. *Williamsport Area School District*, 563 F.Supp. 697 (M.D. Pa. 1983), the district court held that there was "nothing to preclude the application of *Widmar* in this, a high school, context." *Id.* at 707. The district court then ordered the public school to allow a student Bible study to meet during the student open forum time.

And in *Thompson* v. *Waynesboro Area School District*, 673 F.Supp. 1379 (M.D. Pa. 1987) *affirmed by an equally divided court*, (no. 88-5235, 3rd Cir. May 31, 1989) the district court found that the public high school was an open forum during the school day for student distribution of religious newspapers.

Contrary to what Centennial alleges, the current trend in the circuit courts and many district courts is that public schools can be open forums, and that religious groups cannot be excluded from them.[14]

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[14] Although many lower courts have ruled consistently with *Wid-*

### B. Centennial Mischaracterizes The Current State Of The Law.

In attempting to claim that a conflict exists among the federal courts in the application of *Widmar* to public schools, Centennial cites a number of old cases from the Second, Third and Ninth Circuits. Centennial fails to inform this Court that most of those decisions have been specifically overturned or rendered obsolete by later decisions such as *Widmar* and *Mergens*.

Centennial cites two Third Circuit decisions, *Bender* v. *Williamsport Area School District*, 741 F.2d 538 (3rd Cir. 1984) and *Student Coalition for Peace* v. *Lower Merion School District*, 776 F.2d 431 (3rd Cir. 1985) for the proposition that high schools are not equivalent to colleges in open forum analysis and therefore *Widmar* does not apply to the case at bar.

It is interesting that Centennial cites old Third Circuit cases to claim that a new Third Circuit decision is wrong. Obviously, the Third Circuit is the master of its own precedents. The Third Circuit certainly views its ruling in *Gregoire* as its current word on open forum law. The Third Circuit views earlier decisions as distinguishable from or overruled by *Gregoire*.

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*mar* and *Mergens*, it should be noted that three district courts have refused to allow religious groups to use open forums in public schools. In *Wallace* v. *Washoe County School District*, 701 F.Supp. 187 (D.Nev. 1988), the district court refused to allow a church to meet regularly at the open forum of a public school. In *Lamb's Chapel* v. *Center Moriches School District*, 736 F.Supp. 1247 (E.D.N.Y. 1990), the district court refused to allow a church to rent a public school for five successive Wednesday nights to show a film series by Dr. James Dobson that had religious content. In *Grace Bible Fellowship* v. *Maine School Area District #5*, (D.Maine, No. 89-0275-B, December 11, 1989, unreported decision) the district court refused to grant a temporary restraining order to allow a church to have a evangelistic Christmas banquet for the community of Rockland, Maine at the high school open forum, because the district court said any church use of a public school always violates the Establishment Clause.

Also, Centennial is simply wrong in viewing these two cases as applicable to this case. In *Bender*, this Court vacated the Third Circuit's decision on a question of standing[15] and overruled the merits of that decision with *Mergens*, where this Court specifically held that allowing student Bible groups in high schools *does not* violate the Establishment Clause. Therefore, the Third Circuit's opinion in *Bender* no longer is good law.

Centennial cites the Third Circuit decision in *Student Coalition* for a proposition which the *Gregoire* court expressly said it did not stand for. The Third Circuit specifically distinguishes its holding in *Student Coalition* from the present case:

> We grounded our decision [in *Student Coalition*] on the facts of that case and found that the school board had not opened the property to public use so as to create a limited forum. *We did not take the position that a public forum could not be created in a secondary school, i.e., that a Widmar open forum could not exist in a secondary school facility.* Instead, we undertook the same forum analysis set forth here and, on different facts, with much more limited access, found that no public forum had been created.

*Gregoire*, 907 F.2d at ____, (cert. pet. at 25a) (emphasis added).

Next, Centennial cites two decisions (one from the Second Circuit and one from the Ninth Circuit) to show conflict among the circuits with the Third Circuit's ruling in this case. The cases are *Garnett* v. *Renton School District No. 403*, 874 F.2d 608 (9th Cir. 1989) and *Brandon* v. *Board of Education*, 635 F.2d 971 (2nd Cir. 1980).

The Ninth Circuit's decision in *Garnett* is no longer good law. On June 11, 1990, this Court vacated the Ninth Circuit's decision in *Garnett* and remanded the case for further consideration in light of *Mergens*. 496 U.S. ____, 110 L.Ed.2d 628 (1990).

This Court also, in effect, overruled the Second Circuit decision in *Brandon* with the *Mergens* decision. In *Mergens*,

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[15] 475 U.S. 534 (1986).

this Court noted that Congress passed the Equal Access Act "in response to two federal appellate court decisions holding that student religious groups could not, consistent with the Establishment Clause, meet on School premises during non-instructional time." 110 L.Ed.2d at 208. One of those two cases listed was the Second Circuit's decision in *Brandon*.

*Brandon* said that it violated the Establishment Clause to allow student-led Bible studies to meet on a public school campus. This Court clearly rejected that notion in *Mergens* (110 L.Ed.2d at 214), so *Brandon* is no longer good law.

Also, Centennial wrestled one quotation out of context from *Nicholson* v. *Board of Education*, 682 F.2d 858 (9th Cir. 1982) for the proposition that *Widmar*'s open forum principles do not apply to public schools. The facts of *Nicholson* show that it is irrelevant to the present case. *Nicholson* involved the firing of a high school teacher who, as advisor of the school sponsored newspaper, did not abide by the pre-publication review process. *Nicholson* has no connection to the free speech/open forum discussion in the present case.

Centennial highlighted (out of context) one quotation from a footnote in *Nicholson* that said "different considerations govern application of the First Amendment on college campus than at lower level educational institutions," *id.* at 863 n.4. Here, the Ninth Circuit was footnoting the statement that "officials and teachers must be accorded wide latitude over decisions affecting the manner in which they educate students. *Id.* at 863.

The only arguable conflict among the circuits exists between the Third Circuit's *Gregoire* decision and the Second Circuit's decision in *Deeper Life Christian Fellowship, Inc.* v. *Board of Education*, 852 F.2d 676 (2nd Cir. 1988). In *Deeper Life*, the Second Circuit ruled that a public school could establish a proper "limited open forum" that allowed a wide range of civic groups, but excluded religious groups. This principle was rejected by the Third Circuit in *Gregoire*, and has no basis in any decision of this Court.

However, the Second Circuit in *Deeper Life* ruled in favor of the church use of the forum, because the evidence showed that the school district had allowed other religious groups to use the schools. The Second Circuit now has before it the appeal of *Toby Travis* v. *Owego-Apalachin School District*, (1990 WL 94196) (N.D.N.Y. 1990), in which the district court questioned the continuing vitality of *Deeper Life* in light of *Mergens*. The New York federal district court in *Travis* allowed a religious group to use the public school for an evangelistic performance by a Christian illusionist similar to Andre Kole in *Gregoire*.[16]

The permissible scope of what a school district can and must allow in the education of students is not and never has been at issue in this case. There is no issue of students or impressionable youth at all. It is simply a question of whether or not a school district which generally allows outside groups to use its facilities can prohibit other groups access to the facilities solely because of the religious content of their speech. The Third Circuit applying this Court's precedent, correctly said "No."

## CONCLUSION

For the foregoing reasons, Student Venture respectfully requests that Centennial's Petition for Writ of Certiorari be denied, or, in the alternative, that this Court grant cert and affirm this ruling of the Third Circuit.

Date: September 15, 1990

Respectfully submitted,

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[16] Three federal district courts have refused to allow religious groups to use open forums in public schools. See footnote 14.